

Federal Administrative Law

*A Treatise on the Legal Principles Governing
the Validity of Action of Federal Admin-
istrative Agencies, and of State
Agencies on Federal
Questions*

By
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Federal Administrative Law

Volume 2

BOOK III JUDICIAL REVIEW (Continued)

PART IV EXTENT AND SCOPE OF JUDICIAL REVIEW (Continued)

SUBDIVISION VI JUDICIAL REVIEW OF ADMINISTRATIVE DETER- MINATIONS OF ADMINISTRATIVE QUESTIONS

CHAPTER 30

THE PRIME ADMINISTRATIVE FUNCTION: DETERMINA- TION OF ADMINISTRATIVE QUESTIONS

- § 505. Introduction.
- § 506. Administrative Questions in General.
- § 507. Legislative Character of the Administrative Function.
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jury in a suit at law for damages.¹² There is no administrative question involved, the courts being called on to decide a question of fact as to whether the carrier has violated the rule to plaintiffs' damage, which question has not been committed by Congress for administrative determination.¹³

§ 507. Legislative Character of the Administrative Function.

The prime function of an administrative agency, as an arm of the legislature, is to determine the factual matters within the legislative province which have been lawfully delegated to the agency for determination, that is, administrative questions.¹⁴ In the determination of an administrative question an agency exercises broad legislative discretion of precisely the same character as that of the legislature itself if it were making the determination.¹⁵ It makes such determinations as a legislative agent, looking to legislative action.¹⁶ Its action should be an exercise of sound and legal legislative discretion,¹⁷ and this

¹² *Southern R. Co. v. Campbell* (1915) 239 U. S. 99, 60 L. Ed. 165, 36 S. Ct. 33; *Pennsylvania R. Co. v. Puritan Coal Co.* (1915) 237 U. S. 121, 59 L. Ed. 867, 35 S. Ct. 484.

¹³ *Pennsylvania R. Co. v. Puritan Coal Co.* (1915) 237 U. S. 121, 59 L. Ed. 867, 35 S. Ct. 484.

¹⁴ See *United States v. Rock Royal Co-operative, Inc.* (1939) 307 U. S. 533, 83 L. Ed. 1446, 59 S. Ct. 993; *A. L. A. Schechter Poultry Corp. v. United States* (1935) 295 U. S. 495, 79 L. Ed. 1570, 55 S. Ct. 837, 97 A. L. R. 947; *The Assigned Car Cases* (1927) 274 U. S. 564, 71 L. Ed. 1204, 47 S. Ct. 727.

¹⁵ See § 68.

Alien Cases.

United States ex rel. Coria v. Commissioner of Immigration (D. C. S. D. N. Y., 1938) 25 F. Supp. 569.

Interstate Commerce Commission.

Youngstown Sheet & Tube Co. v. United States (D. C. N. D. Ohio, E. Div., 1934) 7 F. Supp. 33, aff'd 295 U. S. 476, 79 L. Ed. 1553, 55 S. Ct. 822.

Secretary of Agriculture.

St. Joseph Stock Yards Co. v. United States (1936) 298 U. S. 38, 80 L. Ed. 1033, 56 S. Ct. 720.

State Agencies.

Railroad Commission of California v. Pacific Gas & Electric Co. (1938) 302 U. S. 388, 82 L. Ed. 319, 58 S. Ct. 334; *West v. Chesapeake & Potomac Telephone Co.* (1935) 295 U. S. 662, 79 L. Ed. 1640, 55 S. Ct. 894; *Louisville & N. R. Co. v. Garrett* (1913) 231 U. S. 298, 58 L. Ed. 229, 34 S. Ct. 48.

¹⁶ *Van Valkenburgh, C. J.*, dissenting in *Morgan v. United States* (D. C. W. D. Mo., W. D., 1937) 23 F. Supp. 380, rev'd 304 U. S. 1, 82 L. Ed. 1129, 58 S. Ct. 773, rehearing denied 304 U. S. 23, 82 L. Ed. 1135, 58 S. Ct. 999. See *Humphrey v. United States* (1935) 295 U. S. 602, 79 L. Ed. 1611, 55 S. Ct. 869.

Hence a state administrative order may be within the contracts clause of the United States Constitution, since it is state legislative action. *American Toll Bridge Co. v. Railroad Commission* (1939) 307 U. S. 486, 83 L. Ed. 1414, 59 S. Ct. 948.

¹⁷ *Myles Salt Co. v. Board of Com'rs Iberia & St. Mary Drainage Dist.* (1916) 239 U. S. 478, 60 L. Ed. 392, 36 S. Ct. 204.

legislative discretion delegated necessarily extends to the entire legislative process.¹⁸

§ 508. Scope of Judicial Function Respecting Administrative Questions.

Judicial review of administrative action being limited to questions of law,¹⁹ the only questions of law involved on review of determinations of administrative questions are (1) whether there are proper findings of fact,²⁰ supported by basic findings or facts particularly stated,²¹ and (2) whether those findings are supported by substantial evidence.²² This is only to ascertain if there is a rational basis for the conclusions approved by the administrative agency. These two requirements in administrative law do not apply to judicial review of direct legislative action, since the legislature need not make findings or take evidence. The legislature is nevertheless presumed to have decided factual or legislative matters correctly until shown in a judicial proceeding to have acted arbitrarily or without a rational basis in fact.^{22a} Hence legislative determinations, both direct and indirect, ultimately meet the same test, although through different routes.^{22b}

A court may also ascertain whether an agency has neglected to consider factors required as a matter of law to be considered in reaching its determination.²³ An administrative determination on the facts is final unless the facts compel the inference of a contrary causal relation as a matter of law.²⁴

And even if an order is void for imperfections of form or slips of procedure,²⁵ such as failure to embody the facts supporting the conclusion in the findings, in such context void is the equivalent of voidable.²⁶ A party subject to the order is not at liberty to take the law into its own hands and refuse submission to the order without the

18 *West v. Chesapeake & Potomac Telephone Co.* (1935) 295 U. S. 662, 79 L. Ed. 1640, 55 S. Ct. 894.

19 See §§ 41, 249, 423 et seq.

20 See § 550 et seq.

21 See § 564 et seq.

22 See § 575 et seq.

22a See *Nebbia v. New York* (1934) 291 U. S. 502, 78 L. Ed. 940, 54 S. Ct. 505.

22b See *Monongahela Bridge Co. v. United States* (1910) 216 U. S. 177, 54 L. Ed. 435, 30 S. Ct. 356.

23 *Swift & Co. v. Wallace* (C. C. A. 7th, 1939) 105 F. (2d) 848.

24 *Youngstown Sheet & Tube Co. v. United States* (D. C. N. D. Ohio, E. Div., 1934) 7 F. Supp. 33, aff'd 295 U. S. 476, 79 L. Ed. 1553, 55 S. Ct. 822.

25 *Atlantic Coast Line R. Co. v. Florida* (1935) 295 U. S. 301, 79 L. Ed. 1451, 55 S. Ct. 713. See also § 274 et seq.

26 *Atlantic Coast Line R. Co. v. Florida* (1935) 295 U. S. 301, 79 L. Ed. 1451, 55 S. Ct. 713.

sanction of a court. It may expose itself to criminal and civil suits and penalties by doing so.²⁷ Findings and orders, which are the opinions of experts on matters within their special knowledge, are entitled to great respect.²⁸ Thus, while a rate order of the Interstate Commerce Commission can only apply to the future, a court of equity may rightly apply its terms to an identical situation in the past.²⁹

The finality conceded to administrative findings of fact cannot take from the courts the power to construe a statute and to decide whether it covers such a situation as the facts present.³⁰

§ 509. The Doctrine of Administrative Finality: In General.

The legislative character of the discretion reposed in an administrative agency respecting administrative questions is responsible for the far-reaching doctrine of administrative finality. When the legislature itself acts within the broad field of legislative discretion, its determinations are conclusive.³¹ Likewise when an administrative agency acts within the broad field of properly delegated legislative discretion, its determinations are conclusive.³² Thus where a statute provides that

²⁷ *Atlantic Coast Line R. Co. v. Florida* (1935) 295 U. S. 301, 79 L. Ed. 1451, 55 S. Ct. 713.

²⁸ *Atlantic Coast Line R. Co. v. Florida* (1935) 295 U. S. 301, 79 L. Ed. 1451, 55 S. Ct. 713.

²⁹ *Atlantic Coast Line R. Co. v. Florida* (1935) 295 U. S. 301, 79 L. Ed. 1451, 55 S. Ct. 713. See also § 711.

³⁰ *Washburn v. Commissioner of Internal Revenue* (C. C. A. 8th, 1931) 51 F. (2d) 949. See also § 449 et seq.

³¹ *St. Joseph Stock Yards Co. v. United States* (1936) 298 U. S. 38, 80 L. Ed. 1033, 56 S. Ct. 720; *Louisville & N. R. Co. v. Garrett* (1913) 231 U. S. 298, 58 L. Ed. 229, 34 S. Ct. 48.

³² *Alien Cases*.

Kessler v. Strecker (1939) 307 U. S. 22, 83 L. Ed. 1082, 59 S. Ct. 694; *Lloyd Sabaudo Societa Anonima v. Elting* (1932) 287 U. S. 329, 77 L. Ed. 341, 53 S. Ct. 167; *Kwock Jan Fat v. White* (1920) 253 U. S. 454, 64 L. Ed. 1010, 40 S. Ct. 566; *Gegiow v. Uhl* (1915) 239 U. S. 3, 60 L. Ed. 114, 36 S. Ct. 2; *United States*

ex rel. Squillari v. Day (C. C. A. 3d, 1929) 35 F. (2d) 284.

Board of Tax Appeals.

Colorado Nat. Bank v. Commissioner of Internal Revenue (1938) 305 U. S. 23, 83 L. Ed. 20, 59 S. Ct. 48; **Hilvering v. Rankin* (1935) 295 U. S. 123, 79 L. Ed. 1343, 55 S. Ct. 732; *Phillips v. Commissioner of Internal Revenue* (1931) 283 U. S. 589, 75 L. Ed. 1289, 51 S. Ct. 608; *Slayton v. Commissioner of Internal Revenue* (C. C. A. 1st, 1935) 76 F. (2d) 497, cert. den. 296 U. S. 586, 80 L. Ed. 415, 56 S. Ct. 131; *Old Mission Portland Cement Co. v. Commissioner of Internal Revenue* (C. C. A. 9th, 1934) 69 F. (2d) 676, aff'd 293 U. S. 289, 79 L. Ed. 367, 55 S. Ct. 158.

Commissioner of Prohibition.

Roge Laboratories v. Doran (1931) 60 App. D. C. 51, 47 F. (2d) 413; *Quitt v. Stone* (C. C. A. 4th, 1931) 46 F. (2d) 405, cert. den. 283 U. S. 839, 75 L. Ed. 1450, 51 S. Ct. 487.

Court of Claims.

See *United States v. Gilliat* (1896) 164 U. S. 42, 41 L. Ed. 344, 17 S. Ct. 16.

an agency's determination shall be "final" it is intended to make it unimpeachable except for such fraud or mistake as would afford

Director of the Veterans' Bureau.

Meadows v. United States (1930) 281 U. S. 271, 74 L. Ed. 852, 50 S. Ct. 279, 73 A. L. R. 310.

Federal Alcohol Administration.

Atlanta Beer Distributing Co., Inc. v. Alexander (C. C. A. 5th, 1937) 93 F. (2d) 11, cert. den. (1938) 303 U. S. 644, 82 L. Ed. 1106, 58 S. Ct. 645.

Federal Communications Commission.

*Rochester Telephone Corp. v. United States (1939) 307 U. S. 125, 83 L. Ed. 1147, 59 S. Ct. 754; American Telephone & Telegraph Co. v. United States (1936) 299 U. S. 232, 81 L. Ed. 142, 57 S. Ct. 170.

Federal Power Commission.

Federal Power Commission v. Pacific Power & Light Co. (1939) 307 U. S. 156, 83 L. Ed. 1180, 59 S. Ct. 766.

Federal Radio Commission.

Federal Radio Commission v. Nelson Bros. Bond & Mtg. Co. (1933) 289 U. S. 266, 77 L. Ed. 1166, 53 S. Ct. 627, 89 A. L. R. 406.

Federal Trade Commission.

Federal Trade Commission v. Algoma Lumber Co. (1934) 291 U. S. 67, 78 L. Ed. 655, 54 S. Ct. 315; Arkansas Wholesale Grocers' Ass'n v. Federal Trade Commission (C. C. A. 8th, 1927) 18 F. (2d) 866, cert. den. 275 U. S. 533, 72 L. Ed. 411, 48 S. Ct. 30.

Interstate Commerce Commission.

Shields v. Utah Idaho C. R. Co. (1938) 305 U. S. 177, 83 L. Ed. 111, 59 S. Ct. 160; Minnie v. Port Huron Terminal Co. (1935) 295 U. S. 647, 79 L. Ed. 1631, 55 S. Ct. 884; Youngstown Sheet & Tube Co. v. United States (D. C. N. D. Ohio, E. Div., 1934) 7 F. Supp. 33, aff'd 295 U. S. 476, 79 L. Ed. 1553, 55 S. Ct. 822; Standard Oil Co. v. United States (1931) 283 U. S. 235, 75 L. Ed. 999, 51 S. Ct. 429; Western Paper Makers'

Chemical Co. v. United States (1926)

271 U. S. 268, 70 L. Ed. 941, 46 S. Ct. 500; United States v. New River Co. (1924) 265 U. S. 533, 68 L. Ed. 1165, 44 S. Ct. 610; Central R. Co. of New Jersey v. United States (1921) 257 U. S. 247, 66 L. Ed. 217, 42 S. Ct. 80; Skinner & Eddy Corp. v. United States (1919) 249 U. S. 557, 63 L. Ed. 772, 39 S. Ct. 375; Pennsylvania Co. v. United States (1915) 236 U. S. 351, 59 L. Ed. 616, 35 S. Ct. 370; *United States v. Louisville & N. R. Co. (1914) 235 U. S. 314, 59 L. Ed. 245, 35 S. Ct. 113; Kansas City Southern Ry. Co. v. United States (1913) 231 U. S. 423, 58 L. Ed. 296, 34 S. Ct. 125; Interstate Commerce Commission v. Louisville & N. R. Co. (1913) 227 U. S. 88, 57 L. Ed. 431, 33 S. Ct. 185; Interstate Commerce Commission v. Delaware, L. & W. R. Co. (1911) 220 U. S. 235, 55 L. Ed. 448, 31 S. Ct. 392; *Interstate Commerce Commission v. Union Pac. R. Co. (1912) 222 U. S. 541, 56 L. Ed. 308, 32 S. Ct. 108; Interstate Commerce Commission v. Illinois Cent. R. Co. (1910) 215 U. S. 452, 470, 54 L. Ed. 280, 30 S. Ct. 155; Illinois Cent. R. Co. v. Interstate Commerce Commission (1907) 206 U. S. 441, 51 L. Ed. 1128, 27 S. Ct. 700; Board of Public Utility Com'rs of New Jersey v. United States (D. C. D. N. J., 1937) 21 F. Supp. 543; Penn Anthracite Mining Co. v. Delaware & H. R. Corp. (D. C. M. D. Pa., 1936) 16 F. Supp. 732, aff'd (C. C. A. 3d, 1937) 91 F. (2d) 634, cert. den. (1937) 302 U. S. 756, 82 L. Ed. 585, 58 S. Ct. 283; Town of Inlet v. New York Cent. R. Co. (D. C. N. D. N. Y., 1934) 7 F. Supp. 781.

Legislative Courts.

See Niles Cement Pond Co. v. United States (1930) 281 U. S. 357, 74 L. Ed. 901, 50 S. Ct. 251.

ground for avoiding a judgment in adversary proceedings.³³ This is true even if the agency based its determination upon an erroneous

National Labor Relations Board.

National Labor Relations Board v. Waterman S. S. Corp. (1940) 309 U. S. 206, 84 L. Ed. 704, 60 S. Ct. 493, rehearing denied 309 U. S. 606, 84 L. Ed. 1036, 60 S. Ct. 611; Consolidated Edison Co. v. National Labor Relations Board (1938) 305 U. S. 197, 83 L. Ed. 126, 59 S. Ct. 206.

Postmaster General.

National Conference on Legalizing Lotteries, Inc. v. Farley (1938) 68 App. D. C. 319, 96 F. (2d) 861, cert. den. 305 U. S. 624, 83 L. Ed. 399, 59 S. Ct. 85.

Railroad Labor Board.

Nashville, C. & St. L. Ry. v. Railway Employees' Dept. of A. F. of L. (C. C. A. 6th, 1937) 93 F. (2d) 340, cert. den. (1938) 303 U. S. 649, 82 L. Ed. 1110, 58 S. Ct. 746.

Secretary of Agriculture.

*St. Joseph Stock Yards Co. v. United States (1936) 298 U. S. 38, 80 L. Ed. 1033, 56 S. Ct. 720; Tagg Bros. & Moorhead v. United States (1930) 280 U. S. 420, 74 L. Ed. 524, 50 S. Ct. 220; Houston v. St. Louis Independent Packing Co. (1919) 249 U. S. 479, 63 L. Ed. 717, 39 S. Ct. 332; American Commission Co. v. United States (D. C. D. Colo., 1935) 11 F. Supp. 965.

Secretary of Commerce.

Swayne & Hoyt v. United States (1937) 300 U. S. 297, 81 L. Ed. 659, 57 S. Ct. 478.

Secretary of the Interior.

Wilbur v. United States ex rel. Kadrie (1930) 281 U. S. 206, 74 L. Ed. 809, 50 S. Ct. 320; De Cambra v. Rogers (1903) 189 U. S. 119, 47 L. Ed. 734, 23 S. Ct. 519; Gardner v. Bonestell (1901) 180 U. S. 362, 45 L. Ed. 574, 21 S. Ct. 399; Heath v. Wallace (1891) 138 U. S. 573, 34 L. Ed. 1063, 11 S. Ct. 380.

Secretary of the Treasury.

Ambruster v. Mellon (1930) 59 App. D. C. 341, 41 F. (2d) 430.

Secretary of War.

*Monongahela Bridge Co. v. United States (1910) 216 U. S. 177, 54 L. Ed. 435, 30 S. Ct. 356.

State Agencies.

Great Northern R. Co. v. Weeks (1936) 297 U. S. 135, 80 L. Ed. 532, 56 S. Ct. 426; West v. Chesapeake & Potomac Telephone Co. (1935) 295 U. S. 662, 79 L. Ed. 1640, 55 S. Ct. 894; Rowley v. Chicago & N. W. R. Co. (1934) 293 U. S. 102, 79 L. Ed. 222, 55 S. Ct. 55, rehearing denied 293 U. S. 632, 79 L. Ed. 717, 55 S. Ct. 211; *People ex rel. New York & Queens Gas Co. v. McCall (1917) 245 U. S. 345, 62 L. Ed. 337, 38 S. Ct. 122; Wadley Southern R. Co. v. Georgia (1915) 235 U. S. 651, 59 L. Ed. 405, 35 S. Ct. 214; Morris v. Duby (1927) 274 U. S. 135, 71 L. Ed. 966, 47 S. Ct. 548; New York ex rel. Woodhaven Gas Light Co. v. Public Service Commission (1925) 269 U. S. 244, 70 L. Ed. 255, 46 S. Ct. 83; Butters v. Oakland (1923) 263 U. S. 162, 68 L. Ed. 228, 44 S. Ct. 62; *Louisville & N. R. Co. v. Garrett (1913) 231 U. S. 298, 58 L. Ed. 229, 34 S. Ct. 48; Moffat Tunnel Improvement Dist. v. Denver & S. L. Ry. Co. (C. C. A. 10th, 1930) 45 F. (2d) 715, cert. den. 283 U. S. 837, 75 L. Ed. 1448, 51 S. Ct. 485; Texport Carrier Corp. v. Smith (D. C. S. D. Tex., Austin Div., 1934) 8 F. Supp. 28.

United States Shipping Board.

See Swayne & Hoyt v. United States (1937) 300 U. S. 297, 81 L. Ed. 659, 57 S. Ct. 478.

Workmen's Compensation Cases.

South Chicago Coal & Dock Co. v. Bassett (1940) 309 U. S. 251, 84 L. Ed. 732, 60 S. Ct. 544.

³³ Wilbur v. United States ex rel. Kadrie (1930) 281 U. S. 206, 74 L. Ed. 809, 50 S. Ct. 320.

rule of law, if the findings of fact, governed by the correct rule of law, are sufficient to sustain the decision and have substantial support in the evidence.³⁴ And even when an order is void for imperfections of form, such as lack of proper findings, void in such context is the equivalent of voidable only.³⁵ The doctrine applies to both quasi-judicial and quasi-legislative action.³⁶

§ 510. Administrative Finality: Miscellaneous Statements.

Prior to the enunciation of the doctrine in the Rochester Telephone case³⁷ the doctrine was expressed through a variety of statements. Thus it was said that an administrative determination on an administrative question will not be disturbed in the absence of convincing evidence of error,³⁸ an administrative order is not reviewable in a court as to administrative questions where the agency has not acted arbitrarily, or without evidence to support its conclusions, or beyond its constitutional or statutory powers,³⁹ or unless it be shown that the proceedings were manifestly unfair, were such as to prevent a fair investigation, or show manifest abuse of the discretion committed to the agency by the statute, or that its authority was not fairly exercised, that is, consistently with the fundamental principles of justice embraced within the conception of due process of law.⁴⁰ Thus it is of paramount importance that courts not encroach upon the exclusive power of the Labor Board, if effect is to be given to the intention of Congress to apply an orderly, informed, and specialized procedure to the complex administrative problems arising in the solution of industrial disputes.⁴¹ Similarly the determination whether a rate is unreasonable or discriminatory is a question on which the finding of the Interstate Commerce Commission is conclusive if supported

³⁴ *Helvering v. Rankin* (1935) 295 U. S. 123, 79 L. Ed. 1343, 55 S. Ct. 732.

³⁵ *Atlantic Coast Line R. Co. v. Florida* (1935) 295 U. S. 301, 79 L. Ed. 1451, 55 S. Ct. 713, rehearing denied 295 U. S. 769, 79 L. Ed. 1710, 55 S. Ct. 911. See also § 142 et seq.

³⁶ *Glens Falls Portland Cement Co. v. Delaware & Hudson Co. (C. C. A. 2d, 1933)* 66 F. (2d) 490, cert. den. 290 U. S. 697, 78 L. Ed. 599, 54 S. Ct. 132.

³⁷ *Rochester Telephone Corp. v. United States* (1939) 307 U. S. 125, 83 L. Ed. 1147, 59 S. Ct. 754.

³⁸ *Butters v. Oakland* (1923) 263 U. S. 162, 68 L. Ed. 228, 44 S. Ct. 62.

³⁹ *Standard Oil Co. v. United States* (1931) 283 U. S. 235, 75 L. Ed. 999, 51 S. Ct. 429; *Pennsylvania Co. v. United States* (1915) 236 U. S. 351, 59 L. Ed. 616, 35 S. Ct. 370.

⁴⁰ *Kwock Jan Fat v. White* (1920) 253 U. S. 454, 64 L. Ed. 1010, 40 S. Ct. 566 (Com'r of Immigration).

⁴¹ *National Labor Relations Board v. Waterman S. S. Corp.* (1940) 309 U. S. 206, 84 L. Ed. 704, 60 S. Ct. 493, rehearing denied 309 U. S. 696, 84 L. Ed. 1036, 60 S. Ct. 611.

by substantial evidence, unless there was some irregularity in the proceeding, or some error in the application of the rules of law.⁴²

In the absence of a legislative rate, it is the province of the courts in deciding cases that arise between carriers and shippers to pass upon the reasonableness of rates. In so doing, the courts apply the common law. But it is the province of the legislature to make the law; and when the legislature, or the body acting under its authority, establishes the rate to be thereafter charged by the carrier, it is the duty of the courts to enforce the rule of law so made unless the constitutional limits of the rate-making power have been transgressed. The rate-making power necessarily implies a range of legislative discretion; and, so long as the legislative action is within its proper sphere, the courts are not entitled to interpose and upon their own investigation of transportation problems to substitute their judgment with respect to the reasonableness of rates for that of the legislature or of a railroad commission exercising its delegated power. If there is a hearing, the consideration of the relevant statements, evidence, and arguments submitted, and a determination by the commission whether the existing rates are excessive, the questions of fact as to the reasonableness of existing rates in the consideration preliminary to legislative action do not become, as such, judicial questions to be reexamined by the courts.⁴³

The National Labor Relations Act provides that the findings of the Labor Board as to the facts, if supported by evidence, shall be conclusive.⁴⁴ It is important that courts not encroach upon this exclusive power of the Board if effect is to be given to the intention of Congress to apply an orderly, informed, and specialized procedure to the complex administrative problems arising in the solution of industrial disputes. As it did in setting up other administrative bodies, Congress has left questions of law which arise before the Board—but not more—ultimately to the traditional review of the judiciary. Not by accident, but in line with general policy, Congress has deemed it wise to entrust the finding of facts to these specialized agencies.⁴⁵ It is not the function of the court to do the work of the agency. If the Court finds the agency's conclusions without legal support, it should

⁴² *Western Paper Makers' Chemical Co. v. United States* (1926) 271 U. S. 268, 70 L. Ed. 941, 46 S. Ct. 500.

⁴³ *Louisville & N. R. Co. v. Garrett* (1913) 231 U. S. 298, 58 L. Ed. 229, 34 S. Ct. 48.

⁴⁴ 49 Stat. 449, § 10 (e), 29 USCA 160 (e). This is likewise the case

with many other recent statutes, set forth in Appendix A.

⁴⁵ *National Labor Relations Board v. Waterman S. S. Corp.* (1940) 309 U. S. 206, 84 L. Ed. 704, 60 S. Ct. 493, rehearing denied 309 U. S. 696, 84 L. Ed. 1036, 60 S. Ct. 611.

enjoin the order, without more.⁴⁶ Interference in matters entrusted by the legislature to the agency alone constitutes reversible error on the part of the court.⁴⁷

Where the order of an agency authorizes action, such as the construction of a railroad line, capable physically of being divided or separated, a reviewing court cannot sustain one portion and enjoin another, for such action would in effect substitute the opinion and plan of the court for that of the agency.⁴⁸

§ 511. Basis of Doctrine.

The doctrine of administrative finality, while now of general application, was evolved first with reference to the Interstate Commerce Commission.⁴⁹ Hence the reason for the rule is found most fully stated in cases dealing with that agency. From the beginning the very purpose for which the Commission was created was to bring into existence a body which from its peculiar character would be most fitted to decide primarily whether from facts, disputed or undisputed, in a given case, preference or discrimination existed. And the amendments making findings of the Commission not merely *prima facie* correct, but conclusive, except as to questions of law, upon judicial review, show the progressive evolution of the legislative purpose and the inevitable conflict which exists between giving that purpose effect and allowing the reviewing court to substitute its own judgment upon administrative questions. If the latter practice were permitted, the Commission would become a mere instrument for the purpose of taking testimony to be submitted to the courts for their ultimate action.⁵⁰

This restriction to legislative determination of the types of fact-finding which involve an exercise of delegated legislative discretion is necessarily based on the doctrine of the separation of powers in the Constitution.⁵¹

⁴⁶ West v. Chesapeake & Potomac Telephone Co. (1935) 295 U. S. 662, 79 L. Ed. 1640, 55 S. Ct. 894.

⁴⁷ National Labor Relations Board v. Waterman S. S. Corp. (1940) 309 U. S. 206, 84 L. Ed. 704, 60 S. Ct. 493, rehearing denied 309 U. S. 696, 84 L. Ed. 1036, 60 S. Ct. 611.

⁴⁸ Chesapeake & O. Ry. Co. v. United States (D. C. S. D. W. Va., 1929) 35 F. (2d) 769, aff'd 283 U. S. 35, 75 L. Ed. 824, 51 S. Ct. 337.

⁴⁹ See § 82.

⁵⁰ United States v. Louisville & N. R. Co. (1914) 235 U. S. 314, 59 L. Ed. 245, 35 S. Ct. 113.

⁵¹ Monongahela Bridge Co. v. United States (1910) 216 U. S. 177, 54 L. Ed. 435, 30 S. Ct. 356; *Den ex dem. Murray v. Hoboken Land & Improvement Co. (1856) 18 How. (59 U. S.) 272, 15 L. Ed. 372.

§ 512. Doctrine Applies Even Though No Order Made.

The doctrine of administrative finality applies to all administrative findings or determinations on administrative questions, wherever there is a justiciable controversy, even if the agency which makes the determination makes no order,⁵² or is not empowered to do so.⁵³ Under an appropriate statutory scheme the doctrine requires that a second administrative agency must accord finality to the determination of a first agency.⁵⁴

§ 513. A General Doctrine as to Basic Requisites of Proof.

An administrative determination is final as to all matters of fact, the determination of which lies within the legislative field. It is not final, however, respecting the questions of law involved any more than are the determinations of the legislature itself.⁵⁵ Courts may review all legislative action on questions of law, since judicial questions are not within the legislative province.⁵⁶ In attributing finality to administrative determinations on administrative questions, which are factual questions, unless they fail to accord with the basic requisites of proof,⁵⁷ the doctrine of administrative finality is similar in substance to the constitutional principle that findings of fact which are made directly by the legislature and are specifically set forth in a statute, are binding on the courts unless shown to have no rational basis in evidence taken in a suit assailing the statute.⁵⁸ It is also the substantial equivalent of the rules governing the validity of determinations of fact by various fact-finding agencies in judicial proceedings themselves, such as juries,⁵⁹ special masters, commissioners, and assessors,⁶⁰ and courts

⁵² Federal Power Commission v. Pacific Power & Light Co. (1939) 307 U. S. 156, 83 L. Ed. 1180, 59 S. Ct. 766; Rochester Telephone Corp. v. United States (1939) 307 U. S. 125, 83 L. Ed. 1147, 59 S. Ct. 754; Shields v. Utah Idaho C. R. Co. (1938) 305 U. S. 177, 83 L. Ed. 111, 59 S. Ct. 160.

⁵³ United States v. Morgan (1939) 307 U. S. 183, 83 L. Ed. 1211, 59 S. Ct. 795.

⁵⁴ Shields v. Utah Idaho C. R. Co. (1938) 305 U. S. 177, 83 L. Ed. 111, 59 S. Ct. 160.

⁵⁵ See National Labor Relations Board v. Waterman S. S. Corp. (1940) 309 U. S. 206, 84 L. Ed. 704, 60 S. Ct.

493, rehearing denied 309 U. S. 696, 84 L. Ed. 1036, 60 S. Ct. 611.

⁵⁶ See National Labor Relations Board v. Waterman S. S. Corp. (1940) 309 U. S. 206, 84 L. Ed. 704, 60 S. Ct. 493, rehearing denied 309 U. S. 696, 84 L. Ed. 1036, 60 S. Ct. 611. See also §§ 41, 73, 425 et seq.

⁵⁷ See § 575 et seq.

⁵⁸ Monongahela Bridge Co. v. United States (1910) 216 U. S. 177, 54 L. Ed. 435, 30 S. Ct. 356.

⁵⁹ Crowell v. Benson (1932) 285 U. S. 22, 76 L. Ed. 598, 52 S. Ct. 285.

⁶⁰ Crowell v. Benson (1932) 285 U. S. 22, 76 L. Ed. 598, 52 S. Ct. 285.

sitting without a jury.⁶¹ In short the same legal standards of the basic prerequisites of proof apply to all determinations of fact, regardless of the nature of the individual, group, or agency, which makes the determination.

While not generally regarded as administrative agencies legislative courts are in some respects analogous bodies, and their determinations may be similarly treated. Thus, for instance, the finding of the Court of Claims that a taxpayer's accounts are kept on the accrual basis is conclusive in the Supreme Court.^{61a}

§ 514. When Doctrine Inapplicable.

An administrative determination of an administrative question is not subject to the doctrine of administrative finality where procedural due process has not been accorded,⁶² as for instance where there has been no hearing,⁶³ or in respect of judicial questions.⁶⁴

§ 515. Legislative Matters Which the Doctrine Excludes from the Judicial Province.

All matters of legislative discretion are excluded from the judicial province.⁶⁵ For instance, the delegated discretion to issue a liquor permit does not impose on the delegate a mere ministerial duty, but places upon him, as the administrative officer directly charged with the enforcement of the law, a responsibility to determine whether the applicant is a fit person.⁶⁶ A statute providing that an adverse decision of the delegate may be reviewed in a court of equity does not undertake to vest in the court the administrative function of determining whether or not the permit should be granted, but merely gives the court authority to determine whether the action of the delegate is based upon an error of law, or is wholly unsupported by the evidence,

⁶¹ *Diamond Alkali Co. v. Heiner* (C. C. A. 3d, 1932) 60 F. (2d) 505, rev'd on other grounds 288 U. S. 502, 77 L. Ed. 921, 53 S. Ct. 413.

^{61a} *Niles Bement Pond Co. v. United States* (1930) 281 U. S. 357, 74 L. Ed. 901, 50 S. Ct. 251. See also § 47.

⁶² See § 274 et seq.

⁶³ *New Hampshire Fire Ins. Co. v. Murray* (C. C. A. 7th, 1930) 105 F. (2d) 212.

⁶⁴ See §§ 262, 424 et seq.

⁶⁵ *Georgia Public Service Commission v. United States* (1931) 283 U. S. 765, 75 L. Ed. 1397, 51 S. Ct. 619; *Louisville & N. R. Co. v. Garrett* (1913) 231 U. S. 298, 58 L. Ed. 229, 34 S. Ct. 48; *United States ex rel. Coria v. Commissioner of Immigration* (D. C. S. D. N. Y., 1938) 25 F. Supp. 569.

⁶⁶ *Ma-King Products Co. v. Blair* (1926) 271 U. S. 479, 70 L. Ed. 1046, 46 S. Ct. 544.

or clearly arbitrary or capricious, as in all judicial review of legislative action.⁶⁷

§ 516. — Weight of Evidence.

The weight of evidence taken in an administrative proceeding is exclusively for the agency, and may not be reconsidered by a reviewing court.⁶⁸ In making its determinations an administrative agency is not

⁶⁷ *Ma-King Products Co. v. Blair* (1926) 271 U. S. 479, 70 L. Ed. 1046, 46 S. Ct. 544.

⁶⁸ *Allen Cases.*

Lloyd Sabaudo Societa Anonima v. Elting (1932) 287 U. S. 329, 77 L. Ed. 341, 53 S. Ct. 167; *United States ex rel. Vajtauer v. Commissioner of Immigration* (1927) 273 U. S. 103, 71 L. Ed. 560, 47 S. Ct. 302; *Lee Lung v. Patterson* (1902) 186 U. S. 168, 46 L. Ed. 1108, 22 S. Ct. 795.

Board of Tax Appeals.

Elmhurst Cemetery Co. v. Commissioner of Internal Revenue (1937) 300 U. S. 37, 81 L. Ed. 491, 57 S. Ct. 324; *Old Mission Portland Cement Co. v. Commissioner of Internal Revenue* (C. C. A. 9th, 1934) 69 F. (2d) 676, aff'd 293 U. S. 289, 79 L. Ed. 367, 55 S. Ct. 158.

Federal Radio Commission.

Federal Radio Commission v. Nelson Bros. Bond & Mfg. Co. (1933) 289 U. S. 266, 77 L. Ed. 1166, 53 S. Ct. 627, 89 A. L. R. 406.

Federal Trade Commission.

Federal Trade Commission v. Algonoma Lumber Co. (1934) 291 U. S. 67, 78 L. Ed. 655, 54 S. Ct. 315; *Federal Trade Commission v. Pacific States Paper Trade Ass'n* (1927) 273 U. S. 52, 71 L. Ed. 534, 47 S. Ct. 255.

Interstate Commerce Commission.

Baltimore & O. R. Co. v. United States, (1936) 298 U. S. 349, 80 L. Ed. 1209, 56 S. Ct. 797; *Atlanta, B. & C. R. Co. v. United States* (1935) 296 U. S. 33, 80 L. Ed. 25, 56 S. Ct. 12; *Youngstown Sheet & Tube Co. v. United States* (D. C.

N. D. Ohio, E. Div., 1934) 7 F. Supp. 33, aff'd 295 U. S. 476, 79 L. Ed. 1553, 55 S. Ct. 822; *Florida v. United States* (1934) 292 U. S. 1, 78 L. Ed. 1077, 54 S. Ct. 603; *Claiborne-Annapolis Ferry Co. v. United States* (1932) 285 U. S. 382, 76 L. Ed. 808, 52 S. Ct. 440; *Merchants Warehouse Co. v. United States* (1931) 283 U. S. 501, 75 L. Ed. 1227, 51 S. Ct. 505; *St. Louis & O'Fallon R. Co. v. United States* (1929) 279 U. S. 461, 73 L. Ed. 798, 49 S. Ct. 384; *The Assigned Car Cases* (1927) 274 U. S. 564, 71 L. Ed. 1204, 47 S. Ct. 727; **Western Paper Makers' Chemical Co. v. United States* (1926) 271 U. S. 268, 70 L. Ed. 941, 46 S. Ct. 500; *United States v. Illinois Cent. R. Co.* (1924) 263 U. S. 515, 68 L. Ed. 417, 44 S. Ct. 189; *The New England Divisions Case* (1923) 261 U. S. 184, 67 L. Ed. 605, 43 S. Ct. 270; *Louisville & N. R. Co. v. United States* (1915) 238 U. S. 1, 59 L. Ed. 1177, 35 S. Ct. 696; *Interstate Commerce Commission v. Louisville & N. R. Co.* (1913) 227 U. S. 88, 57 L. Ed. 431, 33 S. Ct. 185; *Interstate Commerce Commission v. Union Pac. R. Co.* (1912) 222 U. S. 541, 56 L. Ed. 308, 32 S. Ct. 108.

Secretary of Agriculture.

St. Joseph Stock Yards Co. v. United States (1936) 298 U. S. 38, 80 L. Ed. 1033, 56 S. Ct. 720.

State Agencies.

Great Northern R. Co. v. Weeks (1936) 297 U. S. 135, 80 L. Ed. 532, 56 S. Ct. 426; **People ex rel. New York & Queens Gas Co. v. McCall* (1917) 245 U. S. 345, 62 L. Ed. 337,

hampered by mechanical rules governing the weight of evidence.⁶⁹ The court will not analyze or balance the evidence which was before the agency for the purpose of determining whether it preponderates for or against the conclusion arrived at.⁷⁰ The court cannot make its own appraisal of the testimony, picking and choosing for itself among uncertain and conflicting inferences.⁷¹ All legitimate inferences drawn from the evidence by the administrative agency must be judicially accepted.⁷² It is the duty of the court to give effect to a finding supported by substantial evidence without attempting a retrial.⁷³ The court may give no consideration to the number of witnesses called.⁷⁴ The weight which should be given to a witness' contention that the evidence sought will incriminate him is for the tribunal conducting the trial,⁷⁵ and the credibility of witnesses is for the agency, not the courts.⁷⁶

38 S. Ct. 122; *Great Falls Gas Co. v. Public Service Commission* (D. C. D. Mont., 1929) 34 F. (2d) 297.

Workmen's Compensation Cases.

Del Vecchio v. Bowers (1935) 296 U. S. 280, 80 L. Ed. 229, 56 S. Ct. 190.

⁶⁹ *Western Paper Makers' Chemical Co. v. United States* (1926) 271 U. S. 268, 70 L. Ed. 941, 46 S. Ct. 500.

⁷⁰ **People ex rel. New York & Queens Gas Co. v. McCall* (1917) 245 U. S. 345, 62 L. Ed. 337, 38 S. Ct. 122.

⁷¹ *Federal Trade Commission v. Algonoma Lumber Co.* (1934) 291 U. S. 67, 76 L. Ed. 655, 54 S. Ct. 315; *Federal Trade Commission v. Pacific States Paper Trade Ass'n* (1927) 273 U. S. 52, 71 L. Ed. 534, 47 S. Ct. 255.

⁷² Board of Tax Appeals.

Wilson v. Commissioner of Internal Revenue (C. C. A. 10th, 1935) 76 F. (2d) 476.

Federal Trade Commission.

International Shoe Co. v. Federal Trade Commission (1930) 280 U. S. 291, 74 L. Ed. 431, 50 S. Ct. 89; *Federal Trade Commission v. Pacific States Paper Trade Ass'n* (1927) 273 U. S. 52, 71 L. Ed. 534, 47 S. Ct. 255.

Interstate Commerce Commission.

Western Paper Makers' Chemical Co. v. United States (1926) 271 U. S.

268, 70 L. Ed. 941, 46 S. Ct. 500; *United States v. Pan American Petroleum Corp.* (1938) 304 U. S. 156, 82 L. Ed. 1262, 58 S. Ct. 771; *Youngstown Sheet & Tube Co. v. United States* (D. C. N. D. Ohio, E. Div., 1934) 7 F. Supp. 33, aff'd 295 U. S. 476, 79 L. Ed. 1553, 55 S. Ct. 822.

National Labor Relations Board.

National Labor Relations Board v. Pennsylvania Greyhound Lines, Inc. (1938) 303 U. S. 261, 82 L. Ed. 831, 58 S. Ct. 571, 115 A. L. R. 307.

⁷³ *South Chicago Coal & Dock Co. v. Bassett* (1940) 309 U. S. 251, 84 L. Ed. 732, 60 S. Ct. 544. See also § 575 et seq.

⁷⁴ *Youngstown Sheet & Tube Co. v. United States* (D. C. N. D. Ohio, E. Div., 1934) 7 F. Supp. 33, aff'd 295 U. S. 476, 79 L. Ed. 1553, 55 S. Ct. 822.

⁷⁵ *United States ex rel. Vajtauer v. Commissioner of Immigration* (1927) 273 U. S. 103, 71 L. Ed. 560, 47 S. Ct. 302.

⁷⁶ *Merchants Warehouse Co. v. United States* (1931) 283 U. S. 501, 75 L. Ed. 1227, 51 S. Ct. 505; *Ex parte Masamichi Ikeda* (C. C. A. 9th, 1933) 68 F. (2d) 276.

An administrative agency need not specify the weight given to any item of evidence or fact, or disclose the mental operations by which its decisions are reached.⁷⁷ A court cannot compel an administrative agency to give particular weight to a particular portion of evidence which is not controlling as a matter of law,⁷⁸ or otherwise determine the probative force of the evidence.⁷⁹ Thus an agency is not bound to adopt the cost of a particular utility's services or an average of the cost of several, where to do so would be to leave out of consideration relative size, relative volume, and relative efficiency of individual utilities.⁸⁰ Nor, in fixing an allowance of salesmen's salaries, must an agency adopt an average of salaries theretofore paid, since what is fair recompense for a typical salesman's performance is a matter of judgment based upon all the facts.⁸¹ Conversely, an agency is not required to fix salary allowances for officers of a utility without reference to their actual earnings.⁸²

As the weight of the evidence is for the agency to determine, an agency is not compelled to accept the evidence of experts, on such a question as value. It is not required to surrender its judgment to that of the experts.⁸³

§ 517. — Soundness of Agency's Reasons.

Standing alone, the soundness of an agency's reasoning may not be the subject of judicial inquiry.⁸⁴ Findings are not invalidated by mere error in reasoning on evidence introduced.⁸⁵ It is not enough to learn

⁷⁷ *Baltimore & O. R. Co. v. United States* (1936) 298 U. S. 349, 80 L. Ed. 1209, 56 S. Ct. 797.

⁷⁸ *Acker v. United States* (1936) 298 U. S. 426, 80 L. Ed. 1257, 56 S. Ct. 824.

⁷⁹ *Railroad Commission of California v. Pacific Gas & Electric Co.* (1938) 302 U. S. 388, 82 L. Ed. 599, 58 S. Ct. 3.

⁸⁰ *Acker v. United States* (1936) 298 U. S. 426, 80 L. Ed. 1257, 56 S. Ct. 824.

⁸¹ *Acker v. United States* (1936) 298 U. S. 426, 80 L. Ed. 1257, 56 S. Ct. 824.

⁸² *Acker v. United States* (1936) 298 U. S. 426, 80 L. Ed. 1257, 56 S. Ct. 824.

⁸³ *Gloyd v. Commissioner of Internal Revenue* (C. C. A. 8th, 1933) 63

F. (2d) 649, cert. den. 290 U. S. 633, 78 L. Ed. 551, 54 S. Ct. 52.

⁸⁴ *Interstate Commerce Commission.*

Youngstown Sheet & Tube Co. v. United States (D. C. N. D. Ohio, E. Div., 1934) 7 F. Supp. 33, aff'd 295 U. S. 476, 79 L. Ed. 1553, 55 S. Ct. 822; *Georgia Public Service Commission v. United States* (1931) 283 U. S. 765, 75 L. Ed. 1397, 51 S. Ct. 619; *The Assigned Car Cases* (1927) 274 U. S. 564, 71 L. Ed. 1204, 47 S. Ct. 727; *Western Paper Makers' Chemical Co. v. United States* (1926) 271 U. S. 268, 70 L. Ed. 941, 46 S. Ct. 500; *Virginian Ry. Co. v. United States* (1926) 272 U. S. 658, 71 L. Ed. 463, 47 S. Ct. 222.

⁸⁵ *Northern Pac. R. Co. v. Department of Public Works* (1925) 268 U. S. 39, 69 L. Ed. 837, 45 S. Ct. 412.

that the order is unwise, inexpedient, or at variance with the court's own views as to what is practicable.⁸⁶ This rule guides judicial review of any legislative act. Mere errors of judgment are not reviewable.⁸⁷ A court has no occasion to discuss the objection that an agency's findings are inconsistent with views expressed in its reports in the same or different proceedings.⁸⁸ Neither the agency's utterances, nor its processes of reasoning, as distinguished from its acts, are a subject for injunction.⁸⁹ The courts may not compel administrative agencies, or their constituent members, to submit to examination as to the operation of their minds in deciding an administrative question.⁹⁰ The policy which protects from judicial inquiry the deliberations of other fact-finding bodies, such as juries, extends to an administrative agency.⁹¹ The need for efficient deliberation by a body which has the functions of a prosecutor as well as those of a judge may, however, be even greater than in the case of a neutral arbiter of the facts, such as a jury.⁹²

86 Federal Communications Commission.

American Telephone & Telegraph Co. v. United States (1936) 14 F. Supp. 121, aff'd 299 U. S. 232, 81 L. Ed. 142, 57 S. Ct. 170.

Federal Radio Commission.

Federal Radio Commission v. Nelson Bros. Bond & Mtg. Co. (1933) 289 U. S. 266, 77 L. Ed. 1166, 53 S. Ct. 627, 89 A. L. R. 406.

Interstate Commerce Commission.

Youngstown Sheet & Tube Co. v. United States (D. C. N. D. Ohio, E. Div., 1934) 7 F. Supp. 33, aff'd 295 U. S. 476, 79 L. Ed. 1553, 35 S. Ct. 822; Norfolk & W. R. Co. v. United States (1932) 287 U. S. 134, 77 L. Ed. 218, 53 S. Ct. 52; Beaumont, S. L. & W. Ry. Co. v. United States (D. C. W. D. Mo., W. D., 1929) 36 F. (2d) 789, aff'd 282 U. S. 74, 75 L. Ed. 221, 51 S. Ct. 1; The Assigned Car Cases (1927) 274 U. S. 564, 71 L. Ed. 1204, 47 S. Ct. 727; Virginian Ry. Co. v. United States (1926) 272 U. S. 658, 71 L. Ed. 463, 47 S. Ct. 222; The New England Divisions Case (1923) 261 U. S. 184, 67 L. Ed. 605, 43 S. Ct. 270.

State Agencies.

* People ex rel. New York & Queens Gas Co. v. McCall (1917) 245 U. S. 345, 62 L. Ed. 337, 38 S. Ct. 122.

⁸⁷ Baker v. Druesedow (1923) 263 U. S. 137, 68 L. Ed. 212, 44 S. Ct. 40.

⁸⁸ Georgia Public Service Commission v. United States (1931) 283 U. S. 765, 75 L. Ed. 1397, 51 S. Ct. 619; Virginian Ry. Co. v. United States (1926) 272 U. S. 658, 71 L. Ed. 463, 47 S. Ct. 222; Western Paper Makers' Chemical Co. v. United States (1926) 271 U. S. 268, 70 L. Ed. 941, 46 S. Ct. 500.

⁸⁹ United States v. Los Angeles & S. L. R. Co. (1927) 273 U. S. 299, 71 L. Ed. 651, 47 S. Ct. 413.

⁹⁰ Great Northern R. Co. v. Weeks (1936) 297 U. S. 135, 80 L. Ed. 532, 56 S. Ct. 426. See Union Fork & Hoe Co. v. United States (Ct. Cust. & Pat. App., 1936) 86 F. (2d) 423.

⁹¹ National Labor Relations Board v. Botany Worsted Mills, Inc. (C. C. A. 3d, 1939) 106 F. (2d) 263.

⁹² National Labor Relations Board v. Botany Worsted Mills, Inc. (C. C. A. 3d, 1939) 106 F. (2d) 263.

The fact that administrative agencies are endowed with such broad legislative discretion as is illustrated by the preceding statements, should not be taken to condone or encourage lack of logic in an administrative report. An agency's reasoning may always be considered together with its acts to throw light upon their true character.

§ 518. — Motive of Agency.

Where an administrative order is justified by a lawful purpose, it is not rendered illegal because impelled by an ulterior or unlawful motive on the part of the agency.⁹³

§ 519. — Judgment on Controverted Questions.

A court does not sit as a board of revision to substitute its judgment for that of the legislature or its agents as to matters within the province of either,⁹⁴ and thus a court may not substitute its judgment on an administrative question for that of the agency.⁹⁵ This

⁹³ *Isbrandtsen-Moller Co. v. United States* (1937) 300 U. S. 139, 81 L. Ed. 562, 57 S. Ct. 407.

⁹⁴ *St. Joseph Stock Yards Co. v. United States* (1936) 298 U. S. 38, 80 L. Ed. 1033, 56 S. Ct. 720; *West v. Chesapeake & Potomac Telephone Co.* (1935) 295 U. S. 662, 79 L. Ed. 1640, 55 S. Ct. 894; *Helvering v. Rankin* (1935) 295 U. S. 123, 79 L. Ed. 1343, 55 S. Ct. 732; *Rowley v. Chicago & N. W. R. Co.* (1934) 293 U. S. 102, 79 L. Ed. 222, 55 S. Ct. 55, rehearing denied 293 U. S. 632, 79 L. Ed. 717, 55 S. Ct. 211; *Louisville & N. R. Co. v. Garrett* (1913) 231 U. S. 298, 58 L. Ed. 229, 34 S. Ct. 48.

⁹⁵ Alien Cases.

Lloyd Sabaudo Societa Anonima v. Elting (1932) 287 U. S. 329, 77 L. Ed. 341, 53 S. Ct. 167.

Board of Tax Appeals.

Elmhurst Cemetery Co. of Joliet v. Commissioner of Internal Revenue (1937) 300 U. S. 37, 81 L. Ed. 491, 57 S. Ct. 324; *Helvering v. Tex-Penn Oil Co.* (1937) 300 U. S. 481, 81 L. Ed. 755, 57 S. Ct. 569.

Commissioner of Prohibition.

Roge Laboratories Inc. v. Doran (1931) 60 App. D. C. 51, 47 F. (2d) 413.

Federal Alcohol Administration.

Atlanta Beer Distributing Co., Inc. v. Alexander (C. C. A. 5th, 1937) 93 F. (2d) 11, cert. den. 303 U. S. 644, 82 L. Ed. 1106, 58 S. Ct. 645.

Federal Communications Commission.

Rochester Telephone Corp. v. United States (1939) 307 U. S. 125, 83 L. Ed. 1147, 59 S. Ct. 754; *American Telephone & Telegraph Co. v. United States* (1936) 299 U. S. 232, 81 L. Ed. 142, 57 S. Ct. 170.

Federal Radio Commission.

Federal Radio Commission v. Nelson Bros. Bond & Mfg. Co. (1933) 289 U. S. 266, 77 L. Ed. 1166, 53 S. Ct. 627, 89 A. L. R. 406.

Interstate Commerce Commission.

Florida v. United States (1934) 292 U. S. 1, 78 L. Ed. 1077, 54 S. Ct. 603; *Chicago, R. I. & P. R. Co. v. United States* (1931) 284 U. S. 80, 76 L. Ed. 177, 52 S. Ct. 87; *United States v. New River Co.* (1924) 265 U. S. 533,

rule guides judicial review of any legislative act.⁹⁶ It applies whether the evidence is undisputed⁹⁷ or disputed.⁹⁸ The fact that an argument in opposition to the view of an agency apparently has force furnishes no ground for judicial interference with the course pursued by the agency.⁹⁹ Presumably the agency has considered it, and standing alone the fact that it was not considered a persuasive argument affords no basis for the contention that the determination was arbitrary or otherwise illegal.¹ A writ of mandamus will not be granted where its effect would be to redetermine an administrative question.² Similarly, upon finding in an injunction suit that a state tax violates the equal protection clause because of discrimination in assessment, the federal court should leave the state free to reassess; it is without jurisdiction to fix the base and amount of the tax.³ But the mere inaction of a court, even with the effect of enforcing rates under a void order, by denying restitution of those rates, is not an assumption of legislative powers. It is merely

68 L. Ed. 1165, 44 S. Ct. 610; *Manufacturers R. Co. v. United States* (1918) 246 U. S. 457, 62 L. Ed. 831, 38 S. Ct. 383; *United States v. Louisville & N. R. Co.* (1914) 235 U. S. 314, 59 L. Ed. 245, 35 S. Ct. 113; *The Los Angeles Switching Case* (1914) 234 U. S. 294, 58 L. Ed. 1319, 34 S. Ct. 814; *Interstate Commerce Commission v. Louisville & N. R. Co.* (1913) 227 U. S. 88, 57 L. Ed. 431, 33 S. Ct. 185; *Interstate Commerce Commission v. Union Pac. R. Co.* (1912) 222 U. S. 541, 56 L. Ed. 508, 32 S. Ct. 108.

Secretary of Commerce.

Swayne & Hoyt v. United States (1937) 300 U. S. 297, 81 L. Ed. 659, 57 S. Ct. 478.

State Agencies.

Great Northern R. Co. v. Weeks (1936) 297 U. S. 135, 80 L. Ed. 532, 56 S. Ct. 426; *Rowley v. Chicago & N. W. R. Co.* (1934) 293 U. S. 102, 79 L. Ed. 222, 55 S. Ct. 55, rehearing denied 293 U. S. 632, 79 L. Ed. 717, 55 S. Ct. 211; **People ex rel. New York & Queens Gas Co. v. McCall* (1917) 245 U. S. 345, 62 L. Ed. 337, 38 S. Ct. 122; *Louisville & N. R. Co.*

v. Garrett (1913) 231 U. S. 298, 58 L. Ed. 229, 34 S. Ct. 48.

⁹⁶*American Telephone & Telegraph Co. v. United States* (D. C. S. D. N. Y., 1936) 14 F. Supp. 121, *aff'd* 299 U. S. 232, 81 L. Ed. 142, 57 S. Ct. 170.

⁹⁷*United States v. Louisville & N. R. Co.* (1914) 235 U. S. 314, 59 L. Ed. 245, 35 S. Ct. 113.

⁹⁸*Claiborne-Annapolis Ferry Co. v. United States* (1932) 285 U. S. 382, 76 L. Ed. 808, 52 S. Ct. 440.

⁹⁹*Kansas City Southern R. Co. v. United States* (1913) 231 U. S. 423, 58 L. Ed. 296, 34 S. Ct. 125.

¹*Virginian Ry. Co. v. United States* (1926) 272 U. S. 658, 71 L. Ed. 463, 47 S. Ct. 222.

²*Interstate Commerce Commission v. United States ex rel. Waste Merchants Ass'n* (1922) 260 U. S. 32, 67 L. Ed. 112, 43 S. Ct. 6.

³*Rowley v. Chicago & N. W. R. Co.* (1934) 293 U. S. 102, 79 L. Ed. 222, 55 S. Ct. 55, rehearing denied 293 U. S. 632, 79 L. Ed. 717, 55 S. Ct. 211.

a refusal, irrespective of legal rights and remedies, to intervene affirmatively to change the *status quo*.⁴

§ 520. — Condition Relating to Administrative Matters May Not Be Imposed on Judicial Review.

In upholding an administrative determination of an administrative question, a court may not attach to its approval conditions which in effect, determine administrative matters.⁵ Thus, a court may not alter the method of an ordered election and then enforce the modified order, since the method of election to be used is for the agency's determination.⁶

⁴ Atlantic Coast Line R. Co. v. Florida (1935) 295 U. S. 301, 79 L. Ed. 1451, 55 S. Ct. 713, rehearing denied 295 U. S. 769, 79 L. Ed. 1710, 55 S. Ct. 911.

⁵ National Labor Relations Board v. Falk Corp. (1940) 308 U. S. 453, 84 L. Ed. 396, 60 S. Ct. 307.

⁶ National Labor Relations Board v. Falk Corp. (1940) 308 U. S. 453, 84 L. Ed. 396, 60 S. Ct. 307.

CHAPTER 31

PARTICULAR ADMINISTRATIVE QUESTIONS

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- § 524. Questions Under the Fair Labor Standards Act.
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- § 549. Questions as to Value.

§ 521. Introduction.

The particular administrative questions enumerated in this chapter consist only of questions which have been illumined as such by judicial decision. The statute in question in a particular case provides the ultimate criteria for ascertaining the factual questions which have been delegated for administrative determination.

All administrative questions are judicial in the broad sense that a factual condition found to exist must accord with the legal meaning of

the particular legislative policy, standard, or rule of conduct describing that factual condition. In other words, if "unreasonable" rates or "unjust discrimination" are prohibited, rates found to be "unreasonable" or "unjustly discriminatory" must be so within the legal meaning of the words. Certain rates are "unreasonable" or "unjustly discriminatory," or the contrary, as a matter of law.

However, once the legal meaning of a legislative standard describing an administrative question is ascertained, the facts which fit the words as a matter of law become known. Whether those facts exist in a particular case is within the administrative province, and the questions of fact are administrative questions.

§ 522. Questions in Alien Cases.

The various questions of fact which determine whether an alien should be granted admission, are for administrative determination.¹ Congress has prescribed the terms and conditions upon which aliens may be admitted into the United States. Whether or not an alien seeking admission has complied with these is an administrative question to be determined by the agency.² Thus, whether an alien is literate,³ incapacitated to earn his living,⁴ a minor at the time of his arrival,⁵ or a quota immigrant,⁶ are all administrative questions.

While citizenship is a judicial question if a claim thereto is made and supported by substantial evidence,⁷ where there is a mere claim, and no more, the administrative determination of the question is, under the Immigration Act of 1917,⁸ conclusive and not subject to review, unless it appears that the administrative officers denied the claimant an opportunity to establish his citizenship at a fair hearing, or acted in some unlawful or improper way, or abused their discretion.⁹

¹ Kessler v. Strecker (1939) 307 U. S. 22, 83 L. Ed. 1082, 59 S. Ct. 694;
² Tod v. Waldman (1924) 266 U. S. 113, 69 L. Ed. 195, 45 S. Ct. 85;
 United States ex rel. Coria v. Commissioner of Immigration (D. C. S. D. N. Y., 1938) 25 F. Supp. 569.

³ United States ex rel. Squillari v. Day (C. C. A. 3d, 1929) 35 F. (2d) 284.

⁴ Tod v. Waldman (1924) 266 U. S. 113, 69 L. Ed. 195, 45 S. Ct. 85.

⁵ Tod v. Waldman (1924) 266 U. S. 113, 69 L. Ed. 195, 45 S. Ct. 85.

⁶ Sullivan ex rel. Chiu Ging Wah v. Tillinghast (C. C. A. 1st, 1928) 31 F. (2d) 570.

⁷ United States ex rel. Di Rosa v. Day (C. C. A. 2d, 1930) 37 F. (2d) 459.

⁸ See Kessler v. Strecker (1939) 307 U. S. 22, 83 L. Ed. 1082, 59 S. Ct. 694. See also § 269.

⁹ 8 USCA 173.

¹⁰ Quon Quon Poy v. Johnson (1927) 273 U. S. 352, 71 L. Ed. 680, 47 S. Ct. 346.

§ 523. Board of Tea Appeals Questions.

Whether tea meets the standards of purity, quality and fitness for consumption is a question for the determination of the Board of Tea Appeals.¹⁰

§ 524. Questions Under the Fair Labor Standards Act.

What should constitute an area of production, for purposes of the Fair Labor Standards Act is an administrative question to be determined by the Administrator of the Wage and Hour Division of the United States Department of Labor.¹¹

§ 525. Questions Under the Federal Communications Act.

Administrative questions include whether "public interest, convenience or necessity" requires the assignment of broadcasting facilities in a given case;¹² what constitutes "fair and equitable allocation" of broadcasting facilities;¹³ whether a radio-broadcasting station's equipment and the character of its service justify the granting of a license;¹⁴ whether a rule limiting the nighttime power of stations assigned to a certain frequency should be changed;¹⁵ and which forms of account are proper.¹⁶

§ 526. Questions Under the Federal Trade Commission Act.

Administrative questions include whether competition exists between two companies;¹⁷ whether the competition is substantial;¹⁸ whether a

¹⁰ *Waite v. Macy* (1918) 246 U. S. 606, 62 L. Ed. 892, 38 S. Ct. 395. See *Buttfield v. Stranahan* (1904) 192 U. S. 470, 48 L. Ed. 525, 24 S. Ct. 349.

¹¹ *Redlands Foothill Groves v. Jacobs* (D. C. S. D. Cal., Cent. Div., 1940) 30 F. Supp. 995.

¹² *Federal Communications Commission v. Pottsville Broadcasting Co.* (1940) 309 U. S. 134, 84 L. Ed. 656, 60 S. Ct. 437; *Federal Radio Commission v. Nelson Bros. Bond & Mtg. Co.* (1933) 289 U. S. 266, 77 L. Ed. 1166, 53 S. Ct. 627, 89 A. L. R. 406; *Courier Post Pub. Co. v. Federal Communications Commission* (1939) 70 App. D. C. 80, 106 F. (2d) 213.

¹³ *Federal Radio Commission v. Nelson Bros. Bond & Mtg. Co.* (1933)

286 U. S. 266, 77 L. Ed. 1166, 53 S. Ct. 627.

¹⁴ *Greater Kampeska Radio Corp. v. Federal Communications Commission* (1939) 71 App. D. C. 117, 108 F. (2d) 5.

¹⁵ *Pittsburgh Radio Supply House v. Federal Communications Commission* (1938) 69 App. D. C. 22, 98 F. (2d) 303.

¹⁶ *American Telephone & Telegraph Co. v. United States* (1936) 299 U. S. 232, 81 L. Ed. 142, 57 S. Ct. 170. See also §§ 538 and 542.

¹⁷ *International Shoe Co. v. Federal Trade Commission* (1930) 280 U. S. 291, 74 L. Ed. 431, 50 S. Ct. 89.

¹⁸ *International Shoe Co. v. Federal Trade Commission* (1930) 280 U. S. 291, 74 L. Ed. 431, 50 S. Ct. 89.

certain practice has a tendency to lessen competition;¹⁹ or to fix uniform prices;²⁰ what amount of naphtha is effective in soap;²¹ and whether a Commission proceeding is "to the interest of the public" within the meaning of the Act.²²

§ 527. Questions Under the Interstate Commerce and Related Acts.

§ 528. — Reasonableness of Rates.

Questions which are for legislative determination and which may be lawfully delegated to an administrative agency as administrative questions include the fixing of rates,²³ and the reasonableness of any practice of a carrier which gives rise to the application of a rate.²⁴ Thus whether a rate is reasonable is a prime administrative question,²⁵ although in the absence of legislative action, the reasonableness of rates may be decided by the courts, applying the common law.²⁶ The power

¹⁹ Federal Trade Commission v. Pacific States Paper Trade Ass'n (1927) 273 U. S. 52, 71 L. Ed. 534, 47 S. Ct. 255.

²⁰ Federal Trade Commission v. Pacific States Paper Trade Ass'n (1927) 273 U. S. 52, 71 L. Ed. 534, 47 S. Ct. 255.

²¹ Procter & Gamble Co. v. Federal Trade Commission (C. C. A. 6th, 1926) 11 F. (2d) 47, cert. den. 273 U. S. 717, 718, 71 L. Ed. 856, 47 S. Ct. 106.

²² See Federal Trade Commission v. Algoma Lumber Co. (1934) 291 U. S. 67, 78 L. Ed. 655, 54 S. Ct. 315.

²³ See St. Joseph Stock Yards Co. v. United States (1936) 298 U. S. 38, 80 L. Ed. 1033, 56 S. Ct. 720.

²⁴ Northern Pac. R. Co. v. Solum (1918) 247 U. S. 477, 62 L. Ed. 1221, 38 S. Ct. 550.

²⁵ Interstate Commerce Commission.

Great Northern R. Co. v. Sullivan (1935) 294 U. S. 458, 79 L. Ed. 992, 55 S. Ct. 472; Illinois Commerce Commission v. United States (1934) 292 U. S. 474, 78 L. Ed. 1371, 54 S. Ct. 783; Mississippi Valley Barge Line Co. v. United States (1934) 292 U. S.

282, 78 L. Ed. 1260, 54 S. Ct. 692; Standard Oil Co. v. United States (1931) 283 U. S. 235, 75 L. Ed. 999, 51 S. Ct. 429; Brimstone Railroad & Canal Co. v. United States (1928) 276 U. S. 104, 72 L. Ed. 487, 48 S. Ct. 282; Virginian Ry. Co. v. United States (1926) 272 U. S. 658, 71 L. Ed. 463, 47 S. Ct. 222; Western Paper Makers' Chemical Co. v. United States (1926) 271 U. S. 268, 70 L. Ed. 941, 46 S. Ct. 500; Great Northern R. Co. v. Merchants Elevator Co. (1922) 259 U. S. 285, 66 L. Ed. 943, 42 S. Ct. 477; *Atchison, T. & S. F. R. Co. v. United States (1914) 232 U. S. 199, 58 L. Ed. 568, 34 S. Ct. 291; Interstate Commerce Commission v. Chicago, R. I. & P. R. Co. (1910) 218 U. S. 88, 54 L. Ed. 946, 30 S. Ct. 651; Ohio v. United States (D. C. S. D. Ohio, E. Div., 1934) 6 F. Supp. 386, aff'd 292 U. S. 498, 78 L. Ed. 1388, 54 S. Ct. 792.
State Agencies.

Louisville & N. R. Co. v. Garrett (1913) 231 U. S. 298, 58 L. Ed. 229, 34 S. Ct. 48.

²⁶ Louisville & N. R. Co. v. Garrett (1913) 231 U. S. 298, 58 L. Ed. 229, 34 S. Ct. 48.

to determine whether rates are reasonable includes the power to determine the reasonableness of allowances to shippers for the use of privately owned cars,²⁷ and involves determining what elements, such as the costs of repairing the cars, are to be included in the shippers' compensation.²⁸ Whether the charge for a service ancillary to transportation, such as icing cars, is reasonable is an administrative question.²⁹ Whether proposed rates shall be suspended pending an investigation as to their reasonableness is an administrative question.³⁰

§ 529. — Reasonableness of Railway Practices and Rules.

Administrative questions include the question whether a carrier's rule is reasonable,³¹ and whether a railway operating practice is reasonable, such as a practice, in time of car shortage, of distributing open-top cars to mines which could use only those, and box cars only to wagon mines which could use either type.³²

§ 530. — Discrimination and Prejudice.

Administrative questions include the question whether there has been undue discrimination in rates,³³ services,³⁴ carriers' practices³⁵

²⁷ General American Tank Car Corp. v. El Dorado Terminal Co. (1940) 308 U. S. 422, 84 L. Ed. 361, 60 S. Ct. 325, rehearing denied 309 U. S. 694, 84 L. Ed. 1035, 60 S. Ct. 465.

²⁸ General American Tank Car Corp. v. El Dorado Terminal Co. (1940) 308 U. S. 422, 84 L. Ed. 361, 60 S. Ct. 325, rehearing denied 309 U. S. 694, 84 L. Ed. 1035, 60 S. Ct. 465.

²⁹ Alton & S. R. Co. v. United States (D. C. N. D. Cal., S. Div., 1931) 49 F. (2d) 414; J. C. Famechon Co. v. Northern Pac. R. Co. (C. C. A. 8th, 1927) 23 F. (2d) 307.

³⁰ Manhattan Transit Co. v. United States (D. C. D. Mass., 1938) 24 F. Supp. 174.

³¹ Southern R. Co. v. Campbell (1915) 239 U. S. 99, 60 L. Ed. 165, 36 S. Ct. 33; Pennsylvania R. Co. v. Puritan Coal Min. Co. (1915) 237 U. S. 121, 59 L. Ed. 867, 35 S. Ct. 484; Bodine & Clark Livestock Commission Co. v. Great Northern Ry. Co.

(C. C. A. 9th, 1933) 63 F. (2d) 472, cert. den. 290 U. S. 629, 78 L. Ed. 548, 54 S. Ct. 48.

³² Midland Valley R. Co. v. Barkley (1928) 276 U. S. 482, 72 L. Ed. 664, 48 S. Ct. 342.

³³ Interstate Commerce Commission.

United States v. Chicago Heights Trucking Co. (1940) 310 U. S. 344, 84 L. Ed. 1243, 60 S. Ct. 931; Interstate Commerce Commission v. United States (1934) 292 U. S. 474, 78 L. Ed. 1371, 54 S. Ct. 783; Standard Oil Co. v. United States (1931) 283 U. S. 235, 75 L. Ed. 999, 51 S. Ct. 429; Western Paper Makers' Chemical Co. v. United States (1926) 271 U. S. 268, 70 L. Ed. 941, 46 S. Ct. 500; Chicago, I. & L. R. Co. v. United States (1926) 270 U. S. 287, 70 L. Ed. 590, 46 S. Ct. 226; United States v. Pennsylvania R. Co. (1924) 266 U. S. 191, 69 L. Ed. 243, 45 S. Ct. 43; Nashville, C. & St. L. R. v. Tennessee (1923) 262 U. S. 318, 67 L. Ed. 999, 43 S. Ct. 583; Great Northern R. Co. v. Merchants Elevator

or carriers' rules,³⁶ and the subsidiary questions upon which the question of discrimination depends.³⁷ Whether a reshipping privilege, by which shipments may be stopped at a point for a period up to six months, and then reshipped, the whole charge to be the same as if the shipment had not stopped, is an undue preference, is an administrative question.³⁸ The very purpose for which the Interstate Commerce Commission was created was to bring into existence a body which from its peculiar character would be most fitted primarily to decide from facts, disputed or undisputed, whether, in a given case, preference or discrimination existed.³⁹ Whether rates imposed by state authority

tor Co. (1922) 259 U. S. 285, 66 L. Ed. 943, 42 S. Ct. 477; Central R. Co. of New Jersey v. United States (1921) 257 U. S. 247, 66 L. Ed. 217, 42 S. Ct. 80; *Manufacturers Ry. Co. v. United States (1918) 246 U. S. 457, 62 L. Ed. 831, 38 S. Ct. 383; Pennsylvania R. Co. v. Stineman Coal Min. Co. (1916) 242 U. S. 298, 61 L. Ed. 316, 37 S. Ct. 118; Pennsylvania R. Co. v. Sonman Shaft Coal Co. (1916) 242 U. S. 120, 61 L. Ed. 188, 37 S. Ct. 46; Pennsylvania R. Co. v. Clark Bros. Coal Min. Co. (1915) 238 U. S. 456, 59 L. Ed. 1406, 35 S. Ct. 896; *Pennsylvania Co. v. United States (1915) 236 U. S. 351, 59 L. Ed. 616, 35 S. Ct. 370; United States v. Louisville & N. R. Co. (1914) 235 U. S. 314, 59 L. Ed. 245, 35 S. Ct. 113; New York, N. H. & H. R. Co. v. Interstate Commerce Commission (1906) 200 U. S. 361, 50 L. Ed. 515, 26 S. Ct. 272; Ohio v. United States (D. C. S. D. Ohio, E. Div., 1934) 6 F. Supp. 386, aff'd 292 U. S. 498, 78 L. Ed. 1388, 54 S. Ct. 792. See Interstate Commerce Commission v. United States ex rel. Campbell (1933) 289 U. S. 385, 77 L. Ed. 1273, 53 S. Ct. 607; United States v. Pacific & A. R. & N. Co. (1913) 228 U. S. 87, 57 L. Ed. 742, 33 S. Ct. 443.

But see also § 564 et seq.
Secretary of Commerce.

Swayne & Hoyt v. United States (1937) 300 U. S. 297, 81 L. Ed. 659,

57 S. Ct. 478.

United States Shipping Board.

Swayne & Hoyt v. United States (1937) 300 U. S. 297, 81 L. Ed. 659, 57 S. Ct. 478.

34 Interstate Commerce Commission.

Louisville & N. R. Co. v. United States (1931) 282 U. S. 740, 75 L. Ed. 672, 51 S. Ct. 297; United States v. Louisville & N. R. Co. (1914) 235 U. S. 314, 59 L. Ed. 245, 35 S. Ct. 113; Interstate Commerce Commission v. Delaware, L. & W. R. Co. (1911) 220 U. S. 235, 55 L. Ed. 448, 31 S. Ct. 392.

State Agencies.

Western & A. R. Co. v. Georgia Public Service Commission (1925) 267 U. S. 493, 69 L. Ed. 753, 45 S. Ct. 409.

35 The Assigned Car Cases (1927)
 274 U. S. 564, 71 L. Ed. 1204, 47 S. Ct. 727.

36 Pennsylvania R. Co. v. Puritan Coal Min. Co. (1915) 237 U. S. 121, 59 L. Ed. 867, 35 S. Ct. 484.

37 United States v. Louisiana (1933)
 290 U. S. 70, 78 L. Ed. 181, 54 S. Ct. 28; United States v. Hubbard (1925) 266 U. S. 474, 69 L. Ed. 389, 45 S. Ct. 160.

38 United States v. Louisville & N. R. Co. (1914) 235 U. S. 314, 59 L. Ed. 245, 35 S. Ct. 113.

39 United States v. Louisville & N. R. Co. (1914) 235 U. S. 314, 59 L. Ed. 245, 35 S. Ct. 113.

on intrastate commerce cause undue, unreasonable and unjust discrimination against interstate and foreign commerce is an administrative question.⁴⁰

§ 531. — Just Divisions of Rates.

What divisions of rates between carriers are just and reasonable is an administrative question.⁴¹

§ 532. — Services Included in Line Haul Rate: Transportation Services.

Administrative questions include whether a line haul rate covers a particular railroad service, such as switching facilities,⁴² "spotting" cars in a shipper's plant,⁴³ interchange by truck between railroads in terminal cities for less than carload freight,⁴⁴ icing cars,⁴⁵ loading or unloading stock cars at a particular city,⁴⁶ and whether services are transportation services.⁴⁷

⁴⁰ Department of Public Works v. United States (D. C. W. D. Wash., S. Div., 1932) 55 F. (2d) 392. But see § 262 et seq.

⁴¹ Interstate Commerce Commission.

United States v. Baltimore & O. R. Co. (1931) 284 U. S. 195, 76 L. Ed. 243, 52 S. Ct. 109; Beaumont, S. L. & W. Ry. Co. v. United States (D. C. W. D. Mo., W. Div., 1929) 36 F. (2d) 789, aff'd 282 U. S. 74, 75 L. Ed. 221, 51 S. Ct. 1; Brimstone Railroad & Canal Co. v. United States (1928) 276 U. S. 104, 72 L. Ed. 487, 48 S. Ct. 282; Manufacturers R. Co. v. United States (1918) 246 U. S. 457, 62 L. Ed. 831, 38 S. Ct. 383; O'Keefe v. United States (1916) 240 U. S. 294, 60 L. Ed. 651, 36 S. Ct. 313; Atlantic Coast Line R. Co. v. Boston & M. R. Co. (D. C. D. Mass., 1937) 18 F. Supp. 886.

⁴² United States v. Pan American Petroleum Corp. (1938) 304 U. S. 156, 82 L. Ed. 1262, 58 S. Ct. 771; *The Los Angeles Switching Case (1914) 234 U. S. 294, 58 L. Ed. 1319, 34 S. Ct. 814.

⁴³ Interstate Commerce Commission.

Inland Steel Co. v. United States (D. C. N. D. Ill., E. Div., 1938) 23 F. Supp. 291, aff'd 306 U. S. 153, 83 L. Ed. 557, 59 S. Ct. 415; Louisville Cement Co. v. United States (D. C. W. D. Ky., 1937) 19 F. Supp. 910; Elgin, J. & E. Ry. Co. v. United States (D. C. N. D. Ind., Hammond Div., 1937) 18 F. Supp. 19; Koppers Gas & Coke Co. v. United States (D. C. D. Minn., 3d Div., 1935) 11 F. Supp. 467.

⁴⁴ Central Transfer Co. v. Terminal R. Ass'n (1933) 288 U. S. 469, 77 L. Ed. 899, 53 S. Ct. 444.

⁴⁵ *Atchison, T. & S. F. R. Co. v. United States (1914) 232 U. S. 199, 58 L. Ed. 568, 34 S. Ct. 291.

⁴⁶ Adams v. Mills (1932) 286 U. S. 397, 76 L. Ed. 1184, 52 S. Ct. 589.

⁴⁷ Merchants' Warehouse Co. v. United States (D. C. E. D. Pa., 1930) 44 F. (2d) 379, aff'd 283 U. S. 501, 75 L. Ed. 1227, 51 S. Ct. 505; J. C. Famechon Co. v. Northern Pac. R. Co. (C. C. A. 8th, 1927) 23 F. (2d) 307.

§ 533. — Transportation Property.

Administrative questions include whether railroad property is transportation or non-transportation property.⁴⁸ Whether a warehouse to which a railroad made allowances for transportation services was in fact a public station of the road, or a private agency, allowances to which would constitute discriminatory payments, is an administrative question.⁴⁹

§ 534. — Whether Adequate Facilities Have Been Provided.

Whether a railroad has provided itself with adequate facilities is an administrative question.⁵⁰

§ 535. — Commodities Included in Published Tariff.

Whether a published lumber tariff includes shipments of railroad crossties is an administrative question.⁵¹

§ 536. — Whether Act Is in Public Interest.

Administrative questions include whether certain matters are in the public interest, such as the acquisition of one railroad by another;⁵² a proposed railroad lease and conditions for its approval,⁵³ including the adequacy of proposed rentals,⁵⁴ and valuation of stockholders' equities;⁵⁵ the advisability of a plan for consolidating railroads,⁵⁶

⁴⁸ *Norfolk & W. R. Co. v. United States* (1932) 287 U. S. 134, 77 L. Ed. 218, 53 S. Ct. 52.

⁴⁹ *Terminal Warehouse Co. v. United States* (D. C. D. Md., 1929) 31 F. (2d) 951.

⁵⁰ *Louisville & N. R. Co. v. Cory* (C. C. A. 6th, 1931) 54 F. (2d) 8; *J. C. Famechon Co. v. Northern Pac. R. Co.* (C. C. A. 8th, 1927) 23 F. (2d) 307.

⁵¹ *Texas & P. R. Co. v. American Tie & Timber Co. Ltd.* (1914) 234 U. S. 138, 58 L. Ed. 1255, 34 S. Ct. 885.

Construction of tariffs is a judicial question where technical matters are not involved. See § 474.

⁵² *Moffat Tunnel League v. United States* (D. C. D. Del., 1932) 59 F. (2d) 760, aff'd 289 U. S. 113, 77 L. Ed. 1069, 53 S. Ct. 543.

⁵³ *New York Central Securities Corp. v. United States* (1932) 287 U. S. 12, 77 L. Ed. 138, 53 S. Ct. 45; *Atlantic Coast Line R. Co. v. United States* (1932) 284 U. S. 288, 76 L. Ed. 298, 52 S. Ct. 171; *Atlantic Coast Line R. Co. v. United States* (D. C. W. D. S. Car., 1931) 48 F. (2d) 239.

⁵⁴ *New York Central Securities Corp. v. United States* (D. C. S. D. N. Y., 1931) 54 F. (2d) 122, aff'd (1932) 287 U. S. 12, 77 L. Ed. 138, 53 S. Ct. 45.

⁵⁵ *New York Central Securities Corp. v. United States* (D. C. S. D. N. Y., 1931) 54 F. (2d) 122, aff'd (1932) 287 U. S. 12, 77 L. Ed. 138, 53 S. Ct. 45.

⁵⁶ *New York Central Securities Corp. v. United States* (1932) 287 U. S. 12, 77 L. Ed. 138, 53 S. Ct. 45.

including questions of economy;⁵⁷ appropriate provision for and best use of transportation facilities;⁵⁸ and the efficiency of transportation service;⁵⁹ whether particular short lines are complementary to an existing or proposed railway system;⁶⁰ whether proposed acquisition of control of competing carriers will aid in preventing an injurious waste and in securing more efficient transportation service;⁶¹ whether a proposed plan of reorganization is in the public interest, in considering which an agency may investigate the financial set-up, expenses of reorganization and operating plans;⁶² and the establishment of a new through route.⁶³

§ 537. — Public Convenience and Necessity.

Administrative questions include questions of public convenience and necessity, such as whether public convenience and necessity permit or require the abandonment⁶⁴ or the extension of a line,⁶⁵ and the preservation of a line for the maintenance of an adequate transportation system.⁶⁶

§ 538. — Proper Forms of Account.

The power of the Interstate Commerce Commission to prescribe methods of account extends to the substance as well as the form of accounts.⁶⁷

⁵⁷ *New York Central Securities Corp. v. United States* (1932) 287 U. S. 12, 77 L. Ed. 138, 53 S. Ct. 45.

⁵⁸ *New York Central Securities Corp. v. United States* (1932) 287 U. S. 12, 77 L. Ed. 138, 53 S. Ct. 45.

⁵⁹ *New York Central Securities Corp. v. United States* (1932) 287 U. S. 12, 77 L. Ed. 138, 53 S. Ct. 45.

⁶⁰ *New York Central Securities Corp. v. United States* (1932) 287 U. S. 12, 77 L. Ed. 138, 53 S. Ct. 45.

⁶¹ *New York Central Securities Corp. v. United States* (1932) 287 U. S. 12, 77 L. Ed. 138, 53 S. Ct. 45.

⁶² *United States v. Chicago, M., St. P. & P. R. Co.* (1931) 282 U. S. 311, 73 L. Ed. 359, 51 S. Ct. 159. See *Baltimore & O. R. Co. v. United States* (1936) 298 U. S. 349, 80 L. Ed. 1209, 56 S. Ct. 797.

⁶³ *United States v. Missouri Pac. R. Co.* (1929) 278 U. S. 269, 73 L. Ed. 322, 49 S. Ct. 133.

⁶⁴ *Transit Commission v. United States* (1932) 284 U. S. 360, 76 L. Ed. 342, 52 S. Ct. 157.

⁶⁵ See Brandeis, J., dissenting in *Baltimore & O. R. Co. v. United States* (1936) 298 U. S. 349, 80 L. Ed. 1209, 56 S. Ct. 797; *Indian Valley R. Co. v. United States* (D. C. N. D. Cal., S. Div., 1931) 52 F. (2d) 485, mem. aff'd 292 U. S. 608, 78 L. Ed. 1469, 54 S. Ct. 775.

⁶⁶ *New York Central Securities Corp. v. United States* (1932) 287 U. S. 12, 77 L. Ed. 138, 53 S. Ct. 45.

⁶⁷ *Kansas City Southern R. Co. v. United States* (1913) 231 U. S. 423, 58 L. Ed. 296, 34 S. Ct. 125. See also §§ 525, 542.

§ 539. — Miscellaneous Questions.

The following are miscellaneous administrative questions connected with transportation: whether off-track freight stations should be maintained, how many, and where;⁶⁸ which of connecting railroads should pay the cost of transferring traffic between them;⁶⁹ whether the Director-General of Railroads participated in an unjust practice;⁷⁰ whether a carrier is an "interurban electric railway not operated as part of a general steam railroad system";⁷¹ where there is joint supply and use of cars by large and small carriers, which should do the major part of the accounting;⁷² including whatever classification may be necessary;⁷³ in what form railroad tariff schedules should be prepared and arranged;⁷⁴ whether a supplementary study of conditions affecting the regulated body, a careful study having been made, is necessary;⁷⁵ whether certain interchange tracks are reasonably convenient points for the receipt and delivery of freight.⁷⁶

§ 540. Questions Under the National Labor Relations Act.

The following have been held to be administrative questions under the National Labor Relations Act: the nature of the respondents business;⁷⁷ the circumstances of and reasons for the discharge of employees;⁷⁸ such as whether employment has terminated because of joining or engaging in the activities of a union;⁷⁹ whether the practice of an employer is unfair in that it interferes with the right of employees to form, join or assist a labor organization of their own

⁶⁸ Central Transfer Co. v. Terminal Railroad Ass'n (1933) 288 U. S. 469, 77 L. Ed. 899, 53 S. Ct. 444.

⁶⁹ Baltimore & O. R. Co. v. United States (1928) 277 U. S. 291, 72 L. Ed. 885, 48 S. Ct. 520.

⁷⁰ Adams v. Mills (1932) 286 U. S. 397, 76 L. Ed. 1184, 52 S. Ct. 589.

⁷¹ Shields v. Utah Idaho C. R. Co. (1938) 305 U. S. 177, 83 L. Ed. 111, 59 S. Ct. 160.

⁷² Chicago, R. I. & P. R. Co. v. United States (1931) 284 U. S. 80, 76 L. Ed. 177, 52 S. Ct. 87.

⁷³ Chicago, R. I. & P. R. Co. v. United States (1931) 284 U. S. 80, 76 L. Ed. 177, 52 S. Ct. 87.

⁷⁴ Norfolk Southern R. Co. v. Chatman (1917) 244 U. S. 276, 61 L. Ed. 1131, 37 S. Ct. 499.

⁷⁵ Illinois Commerce Commission v. United States (1934) 292 U. S. 474, 78 L. Ed. 1371, 54 S. Ct. 783.

⁷⁶ Elgin, J. & E. Ry. Co. v. United States (D. C. N. D. Ind., Hammond Div., 1937) 18 F. Supp. 19.

⁷⁷ National Labor Relations Board v. Friedman-Harry Marks Clothing Co. (1937) 301 U. S. 58, 81 L. Ed. 921, 57 S. Ct. 645, 108 A. L. R. 1352.

⁷⁸ National Labor Relations Board v. Friedman-Harry Marks Clothing Co. (1937) 301 U. S. 58, 81 L. Ed. 921, 57 S. Ct. 645, 108 A. L. R. 1352.

⁷⁹ National Labor Relations Board v. Waterman S. S. Corp. (1940) 309 U. S. 206, 84 L. Ed. 704, 60 S. Ct. 493, rehearing denied 309 U. S. 696, 84 L. Ed. 1036, 60 S. Ct. 611.

choosing,⁸⁰ interferes with, restrains and coerces employees in the exercise of their rights under the act, as by discrimination in the issue of ship's passes to representatives of different unions;⁸¹ encourages membership in a labor organization;⁸² whether a particular union is dominated by an employer;⁸³ which union represents employees under the Act,⁸⁴ the proper method of designating a bargaining agent,⁸⁵ and, in control of an election proceeding, the determination of the steps necessary to conduct the election fairly,⁸⁶ and what constitutes, in any particular enterprise, the appropriate unit for purposes of collective bargaining;⁸⁷ and the selection of measures which will tend to effectuate the policies of the act in a given case.⁸⁸

§ 541. Questions Under the Postal Laws.

Whether the advertising of a medicinal preparation through the mails, so grossly overstates its true virtue as to work a fraud on the public is an administrative question committed to the determination of the Postmaster-General.⁸⁹

§ 542. Questions Under Revenue Acts.

Administrative questions under the Revenue Laws include whether taxpayer corporations are affiliated,⁹⁰ whether corporate officers' salaries are reasonable;⁹¹ whether "rent" provided for in a legal

⁸⁰ Consolidated Edison Co. v. National Labor Relations Board (1938) 305 U. S. 197, 83 L. Ed. 126, 59 S. Ct. 206.

⁸¹ National Labor Relations Board v. Waterman S. S. Corp. (1940) 309 U. S. 206, 84 L. Ed. 704, 60 S. Ct. 493, rehearing denied 309 U. S. 696, 84 L. Ed. 1036, 60 S. Ct. 611.

⁸² Consolidated Edison Co. v. National Labor Relations Board (1938) 305 U. S. 197, 83 L. Ed. 126, 59 S. Ct. 206.

⁸³ National Labor Relations Board v. Falk Corp. (1940) 308 U. S. 453, 84 L. Ed. 396, 60 S. Ct. 307.

⁸⁴ International Brotherhood of Teamsters, etc. v. International Union of United Brewery, etc., Workers (C. C. A. 9th, 1939) 106 F. (2d) 871.

⁸⁵ National Labor Relations Board v. Falk Corp. (1940) 308 U. S. 453, 84 L. Ed. 396, 60 S. Ct. 307.

⁸⁶ National Labor Relations Board v. Waterman S. S. Corp. (1940) 309 U. S. 206, 84 L. Ed. 704, 60 S. Ct. 493, rehearing denied 309 U. S. 696, 84 L. Ed. 1036, 60 S. Ct. 611.

⁸⁷ National Labor Relations Board v. Lund (C. C. A. 8th, 1939) 103 F. (2d) 815; National Labor Relations Board v. Biles Coleman Lumber Co. (C. C. A. 9th, 1938) 98 F. (2d) 18.

⁸⁸ National Labor Relations Board v. Carlisle Lumber Co. (C. C. A. 9th, 1938) 99 F. (2d) 533, cert. den. 306 U. S. 646, 83 L. Ed. 1045, 59 S. Ct. 586. See also § 437 et seq.

⁸⁹ Leach v. Carlisle (1922) 258 U. S. 138, 66 L. Ed. 511, 42 S. Ct. 227.

⁹⁰ Doernbecher Mfg. Co. v. Commissioner of Internal Revenue (C. C. A. 9th, 1935) 80 F. (2d) 573.

⁹¹ Doernbecher Mfg. Co. v. Commissioner of Internal Revenue (C. C. A. 9th, 1935) 80 F. (2d) 573.

instrument called a "lease" is actually a provision for amortizing a loan;⁹² which forms of accounting are proper,⁹³ so long as the forms prescribed correspond with the facts,⁹⁴ and the amount of an annual depreciation reduction.⁹⁵ Whether particular business inventories are necessary for the determination of income is a practical question left by statute to the judgment of the Commissioner of Internal Revenue.⁹⁶

Whether an applicant for a liquor permit is a fit person to be entrusted with such a privilege is an administrative question.⁹⁷

§ 543. Questions Committed to the Secretary of Agriculture.

Whether the word "sausage" is deceptive as applied to a compound of meat with added cereal and water is an administrative question.⁹⁸

§ 544. Questions Committed to the Secretary of the Interior: Public Lands Cases.

Whether lands are "swamp or overflowed" lands is an administrative question⁹⁹ as is the question whether certain lands were known to be mineral in character prior to a survey.¹

Whether a railroad company applying for a grant of a right of way over public lands is such a railroad as the statute entitles to receive such a grant is treated as an administrative question.²

§ 545. Questions Under the Securities and Exchange and Related Acts.

Administrative questions include whether a registration statement is, in any material respect, incomplete or inaccurate.³

⁹² *Helvering v. F. & R. Lazarus & Co.* (1939) 308 U. S. 252, 84 L. Ed. 226, 60 S. Ct. 209.

⁹³ *Brown v. Helvering* (1934) 291 U. S. 193, 78 L. Ed. 725, 54 S. Ct. 356. See also §§ 525, 538.

⁹⁴ *Lucas v. Ox Fibre Brush Co.* (1930) 281 U. S. 115, 74 L. Ed. 733, 50 S. Ct. 273.

⁹⁵ *Gloyd v. Commissioner of Internal Revenue* (C. C. A. 8th, 1933) 63 F. (2d) 649, cert. den. 290 U. S. 633, 78 L. Ed. 551, 54 S. Ct. 52, 96.

⁹⁶ *Lucas v. Kansas City Structural Steel Co.* (1930) 281 U. S. 264, 74 L. Ed. 848, 50 S. Ct. 263.

⁹⁷ *Ma-King Products Co. v. Blair* (1926) 271 U. S. 479, 70 L. Ed. 1046,

46 S. Ct. 544.

⁹⁸ *Houston v. St. Louis Independent Packing Co.* (1919) 249 U. S. 479, 63 L. Ed. 717, 39 S. Ct. 332.

⁹⁹ *Work v. Louisiana* (1925) 269 U. S. 250, 70 L. Ed. 259, 46 S. Ct. 92.

¹ *Standard Oil Co. of California v. United States* (C. C. A. 9th, 1940) 107 F. (2d) 402, cert. den. 309 U. S. 654, 84 L. Ed. 1003, 60 S. Ct. 469, rehearing denied 309 U. S. 697, 84 L. Ed. 1036, 60 S. Ct. 708.

² *Nobel v. Union River Logging R. Co.* (1893) 147 U. S. 165, 37 L. Ed. 123, 13 S. Ct. 271.

³ *Oklahoma-Texas Trust v. Securities & Exchange Commission* (C. C. A. 10th, 1939) 100 F. (2d) 888.

§ 546. Questions Under State Laws.

When delegated to a state agency, the question of the reasonableness of rates is administrative, although in the absence of legislative action, the question is decided by the courts, applying the common law.⁴ The question whether an intrastate rate, as compared with interstate rates, is unreasonably discriminatory, is administrative.⁵ The question as to what extension of the facilities of a state public utility is reasonable, is an administrative question for the state agency.⁶

§ 547. Questions Committed to the Veterans' Administration.

The general administration of the Adjusted Compensation Act was committed to the Director of the Veterans' Bureau. The Director had exclusive authority to pass on all claims for payment of adjusted compensation certificates.⁷ Administrative questions delegated to him for determination include whether the veteran is dead;⁸ and whether the claimant is the actual beneficiary.⁹ Similarly the question of reinstatement of a lapsed war risk policy is purely one of fact, which the director is authorized to determine, and his decision is final and conclusive.¹⁰

With the exception of war risk insurance cases, proceedings of the Veterans' Administration do not affect private legal rights and hence, except for insurance cases, they involve only administrative questions.¹¹

§ 548. Questions Under Workmen's Compensation Laws.

Questions as to the "circumstances, nature, extent, and consequences of injuries" are administrative,¹² as are the questions as to whether an injury arose "out of and in the course of the employment,"¹³ whether decedent was a "member of a crew" within the

⁴ *Louisville & N. R. Co. v. Garrett* (1913) 231 U. S. 298, 58 L. Ed. 229, 34 S. Ct. 48.

⁵ *Bell Telephone Co. v. Pennsylvania Public Utilities Commission* (1940) 309 U. S. 30, 84 L. Ed. 563, 60 S. Ct. 411.

⁶ *New York ex rel. Woodhaven Gas Light Co. v. Public Service Commission* (1925) 269 U. S. 244, 70 L. Ed. 255, 46 S. Ct. 83.

⁷ *United States v. Williams* (1929) 278 U. S. 255, 73 L. Ed. 314, 49 S. Ct. 97. An "administrator" now performs the functions of the director.

⁸ *United States v. Williams* (1929)

278 U. S. 255, 73 L. Ed. 314, 49 S. Ct. 97.

⁹ *United States v. Williams* (1929) 278 U. S. 255, 73 L. Ed. 314, 49 S. Ct. 97.

¹⁰ *Meadows v. United States* (1930) 281 U. S. 271, 74 L. Ed. 852, 50 S. Ct. 279, 73 A. L. R. 310.

¹¹ See § 135.

¹² *South Chicago Coal & Dock Co. v. Bassett* (C. C. A. 7th, 1939) 104 F. (2d) 522, aff'd 309 U. S. 251, 84 L. Ed. 732, 60 S. Ct. 544.

¹³ *South Chicago Coal & Dock Co. v. Bassett* (1940) 309 U. S. 251, 84 L. Ed. 732, 60 S. Ct. 544.

meaning of the Longshoremen's and Harbor Workers' Compensation Act;¹⁴ whether an injury "was occasioned solely by the intoxication of the employee or by the wilful intention of the employee to injure or kill himself or another";¹⁵ and the question of the dependency of a claimant for compensation.¹⁶

Factual questions of constitutional power and jurisdiction are not included.¹⁷

§ 549. Questions as to Value.

Valuation is a judicial question insofar as the legal theories and basic prerequisites of proof of value are concerned.¹⁸ When the legal theories and basic prerequisites of proof have been met, and no questions of constitutional right are involved, the question as to the fact of value is an administrative question.¹⁹ Within these rules the amount of depreciation allowance is a question of fact for the agency.²⁰

¹⁴ 33 USCA 901-950. *South Chicago Coal & Dock Co. v. Bassett* (1940) 309 U. S. 251, 84 L. Ed. 732, 60 S. Ct. 544.

¹⁵ *South Chicago Coal & Dock Co. v. Bassett* (1940) 309 U. S. 251, 84 L. Ed. 732, 60 S. Ct. 544; *Crowell v. Benson* (1932) 285 U. S. 22, 76 L. Ed. 598, 52 S. Ct. 285.

¹⁶ *South Chicago Coal & Dock Co. v. Bassett* (1940) 309 U. S. 251, 84 L. Ed. 732, 60 S. Ct. 544; *Minnie v. Port Huron Terminal Co.* (1935) 295 U. S. 647, 79 L. Ed. 1631, 55 S. Ct. 884.

¹⁷ See § 262 et seq.

¹⁸ See § 354 et seq.

¹⁹ Board of Tax Appeals.

Elmhurst Cemetery Co. v. Commissioner of Internal Revenue (1937) 300 U. S. 37, 81 L. Ed. 491, 57 S. Ct. 324.

Interstate Commerce Commission.

Atlanta, B. & C. R. Co. v. United States (1935) 296 U. S. 33, 80 L. Ed. 25, 56 S. Ct. 12.

State Agencies.

Great Northern Ry. Co. v. Weeks (1936) 297 U. S. 135, 80 L. Ed. 532, 56 S. Ct. 426; *West v. Chesapeake & Potomac Telephone Co.* (1935) 295 U. S. 662, 79 L. Ed. 1640, 55 S. Ct. 894; *Los Angeles Gas & Electric Corp. v. Railroad Commission* (1933) 289 U. S. 287, 77 L. Ed. 1180, 53 S. Ct. 637.

Compare § 262 et seq.

²⁰ *Clark's Ferry Bridge Co. v. Public Service Commission* (1934) 291 U. S. 227, 78 L. Ed. 767, 54 S. Ct. 427.

CHAPTER 32

DETERMINATION OF ADMINISTRATIVE QUESTIONS AS THE FOUNDATION FOR ADMINISTRATIVE SANCTIONS: ULTIMATE FINDINGS

- § 550. Findings: A Constitutional Requirement.
- § 551. Express, Clear Findings Required.
- § 552. Some Statutory Requirements.
- § 553. The Necessity of Analyzing Findings.
- § 554. Findings Not Required for Regulations or Orders of General Application Legislative in Character.
- § 555. When Either of Two Findings Sufficient.
- § 556. Findings Not Expressly Relied Upon May Not Be Considered.
- § 557. Scope of Group Findings.
- § 558. Findings May Not Exceed Jurisdiction: State Agencies and Interstate Commerce.
- § 559. Illustrations of Requisite Findings.
- § 560. —The Federal Trade Commission.
- § 561. —The Interstate Commerce Commission.
- § 562. —The National Labor Relations Board.
- § 563. —State Agencies.

§ 550. Findings: A Constitutional Requirement.

In creating administrative agencies which conduct adversary proceedings the legislature, to prevent its being a pure delegation of legislative power, must enjoin upon the agency a certain course of procedure, and certain rules of decision in the performance of its function—notably the requirement of findings. When, therefore, an administrative agency is required, as a condition precedent to an order, to make a finding of fact, the validity of the order must rest upon the needed finding. If it is lacking, the order is ineffective.¹ While the requirement of findings is usually set forth in the controlling statute,² the rule that an order is void for lack of an express finding rests not only on the language of the statute, but also on general principles of constitutional government,³ and a statute which does

¹ *Mahler v. Eby* (1924) 264 U. S. 260 U. S. 48, 67 L. Ed. 124, 43 S. Ct. 32, 68 L. Ed. 549, 44 S. Ct. 283. 51.

² See *Wichita Railroad & Light Co. v. Public Utilities Commission* (1922) ³ *Panama Refining Co. v. Ryan* (1935) 293 U. S. 388, 79 L. Ed. 446,

not provide for findings is invalid as an unconstitutional delegation of legislative power.⁴

55 S. Ct. 241; *Mahler v. Eby* (1924) 264 U. S. 32, 68 L. Ed. 549, 44 S. Ct. 283.

"Does this omission invalidate the warrant? The finding is made a condition precedent to deportation by the statute. It is essential that, where an executive is exercising delegated legislative power, he should substantially comply with all the statutory requirements in its exercise and that, if his making a finding is a condition precedent to this act, the fulfillment of that condition should appear in the record of the act. In *Wichita R. R. & Light Co. v. Public Utilities Commission*, 260 U. S. 48, a statute of a State required that a public utility commission should find existing rates to be unreasonable before reducing them, but there was no specific requirement that the order should contain the finding. We held that the order in that case made after a hearing and ordering a reduction was void for lack of the express finding in the order. We put this conclusion not only on the language of the statute but also on general principles of constitutional government. After pointing out the necessity for such delegation of certain legislative power to executive agencies we said (p. 59):

"In creating such an administrative agency the legislature, to prevent its being a pure delegation of legislative power, must enjoin upon it a certain course of procedure and certain rules of decision in the performance of its function. It is a wholesome and necessary principle that such an agency must pursue the procedure and rules enjoined and show a substantial compliance therewith to give validity to its action. When,

therefore, such an administrative agency, is required as a condition precedent to an order, to make a finding of facts, the validity of the order must rest upon the needed finding. If it is lacking, the order is ineffective.

"It is pressed on us that the lack of an express finding may be supplied by implication and by reference to the averments of the petition invoking the action of the Commission. We can not agree to this."

"If the principle thus stated is to be consistently adhered to, it is difficult in any view to give validity to the warrants of deportation before us." (Mr. Chief Justice Taft in *Mahler v. Eby* (1924) 264 U. S. 32, 44, 45, 68 L. Ed. 549, 44 S. Ct. 283.)

⁴*Panama Refining Co. v. Ryan* (1935) 293 U. S. 388, 79 L. Ed. 446, 55 S. Ct. 241.

"If it could be said that from the four corners of the statute any possible inference could be drawn of particular circumstances or conditions which were to govern the exercise of the authority conferred, the President could not act validly without having regard to those circumstances and conditions. And findings by him as to the existence of the required basis of his action would be necessary to sustain that action, for otherwise the case would still be one of an unfettered discretion as the qualification of authority would be ineffectual. The point is pertinent in relation to the first section of the National Industrial Recovery Act. We have said that the first section is but a general introduction, that it declares no policy and defines no standard with respect to the transportation which is the subject of § 9 (c). But if from the ex-

The requirement of findings relates directly to the constitutional requirements for delegation of legislative power,⁵ and is in substance a requirement that the legislative power to determine the factual condition to which a declared legislative policy is to apply, delegated to an administrative agency, be appropriately exercised, without abuse, to the end that essential legislative functions remain vested in the legislative branch of the government.⁶ Just as a statute validly delegating power to an administrative agency must set factual conditions for the application of a declared legislative policy, standard, or rule of conduct, so the delegate of the power must find affirmatively that those conditions exist in a given case before the statutory mandate may be applied to the parties involved. Otherwise, instead of retaining a defined and specific character the power delegated would be vagrant and unlimited. Such a state of affairs would mean the exercise of unlimited power by administrative agencies, without any restraint against arbitrary action or usurpation of power not delegated; and, with the multiplication of agencies, the virtual end of a constitutional system of government.

The requirement of findings is far from a technicality. It is a means of guaranteeing that cases shall be decided according to the evidence and the law, rather than arbitrarily or from extralegal considerations. And they serve the additional purpose of apprising the parties and the reviewing tribunal of the factual basis of the agency's action, so that the parties and the reviewing tribunal may determine

tremely broad description contained in that section and the widely different matters to which the section refers, it were possible to derive a statement of prerequisites to the President's action under § 9 (c), it would still be necessary for the President to comply with those conditions and to show that compliance as the ground of his prohibition. To hold that he is free to select as he chooses from the many and various objects generally described in the first section, and then to act without making any finding with respect to any object that he does select, and the circumstances properly related to that object, would be in effect to make the

conditions inoperative and to invest him with an uncontrolled legislative power." (Mr. Chief Justice Hughes in *Panama Refining Co. v. Ryan* (1935) 293 U. S. 388, 431, 432, 79 L. Ed. 446, 55 S. Ct. 241.)

See also § 8 et seq.

⁵*Panama Refining Co. v. Ryan* (1935) 293 U. S. 388, 79 L. Ed. 446, 55 S. Ct. 241. See *Mahler v. Ebby* (1924) 264 U. S. 32, 68 L. Ed. 549, 44 S. Ct. 283.

⁶*Wichita Railroad & Light Co. v. Public Utilities Commission* (1922) 260 U. S. 48, 67 L. Ed. 124, 43 S. Ct. 51. See *Panama Refining Co. v. Ryan* (1935) 293 U. S. 388, 79 L. Ed. 446, 55 S. Ct. 241.

whether the case has been decided upon the evidence and the law, or, on the contrary, upon arbitrary or extralegal considerations.⁷

It is essential that, where an administrative agency is exercising delegated legislative power, it should comply substantially with all the statutory requirements in its exercise, and that if its making a finding is a condition precedent to its act in applying a statutory mandate, the fulfillment of that condition should appear in the record of the act.⁸

There are, practically speaking, two kinds of findings, ultimate findings and basic findings. Ultimate findings are ordinarily couched in the language of the controlling statute, since their function is to demonstrate that the factual condition upon which the legislative policy, standard, or rule is to become applicable, exists in a particular case. Basic findings consist of more particular statements of fact showing that an ultimate finding couched in general terms is true as a concrete fact, rather than an unsupportable conclusion. There is no necessary logical distinction between these, and essential quasi-judisdictional findings, regarded as "ultimate" in this book, have on occasion been called "basic" by the Supreme Court.⁹

7 "The requirement that courts, and commissions acting in a quasi-judicial capacity, shall make findings of fact, is a means provided by Congress for guaranteeing that cases shall be decided according to the evidence and the law, rather than arbitrarily or from extralegal considerations; and findings of fact served the additional purpose, where provisions for review are made, of apprising the parties and the reviewing tribunal of the factual basis of the action of the court or commission, so that the parties and the reviewing tribunal may determine whether the case has been decided upon the evidence and the law or, on the contrary, upon arbitrary or extralegal considerations. When a decision is accompanied by findings of fact, the reviewing court can decide whether the decision reached by the court or commission follows as a matter of law from the facts stated as its basis, and also whether the facts

so stated have any substantial support in the evidence. In the absence of findings of fact the reviewing tribunal can determine neither of these things. The requirement of findings is thus far from a technicality. On the contrary, it is to insure against Star Chamber methods, to make certain that justice shall be administered according to facts and law. This is fully as important in respect of commissions as it is in respect of courts." (Judge Stephens in *Saginaw Broadcasting Co. v. Federal Communications Commission* (1938) 68 App. D. C. 282, 96 F. (2d) 554, 559, cert. den. 305 U. S. 613, 83 L. Ed. 391, 59 S. Ct. 72.)

⁸ *Mahler v. Eby* (1924) 264 U. S. 32, 68 L. Ed. 549, 44 S. Ct. 283; *Wichita Railroad & Light Co. v. Public Utilities Commission* (1922) 260 U. S. 48, 67 L. Ed. 124, 43 S. Ct. 51.

⁹ See *United States v. Chicago, M., St. P. & P. R. Co.* (1935) 294 U. S. 499, 79 L. Ed. 1023, 55 S. Ct. 462;

§ 551. Express, Clear Findings Required.

Although "ultimate" findings are labeled as such in relatively few cases,¹⁰ it is a well-settled rule that administrative agencies must make clear ultimate findings, that is, findings on all the questions or matters upon whose determination in a particular way rests the agency's jurisdiction and power to apply the statutory mandate; otherwise its act in applying the legislative mandate is invalid.¹¹ Findings on such

United States v. Baltimore & O. R. Co. (1935) 293 U. S. 454, 79 L. Ed. 587, 55 S. Ct. 268. See also § 564 et seq.

10 Board of Tax Appeals.

Helvering v. Tex-Penn Oil Co. (1937) 300 U. S. 481, 81 L. Ed. 755, 57 S. Ct. 569.

Federal Communications Commission.

Tri-State Broadcasting Co. v. Federal Communications Commission (1938) 68 App. D. C. 292, 96 F. (2d) 564; *Saginaw Broadcasting Co. v. Federal Communications Commission (1938) 68 App. D. C. 282, 96 F. (2d) 554.

Interstate Commerce Commission.

Atchison, T. & S. F. R. Co. v. United States (1935) 295 U. S. 193, 79 L. Ed. 1382, 55 S. Ct. 748; Florida v. United States (1931) 282 U. S. 194, 75 L. Ed. 291, 51 S. Ct. 119.

National Labor Relations Board.

National Labor Relations Board v. Newport News Shipbuilding & Dry Dock Co. (1939) 308 U. S. 241, 84 L. Ed. 219, 60 S. Ct. 203.

National Mediation Board.

Virginian Ry. Co. v. System Federation, R. E. D. (1937) 300 U. S. 515, 81 L. Ed. 789, 57 S. Ct. 592.

11 Alien Cases.

Tod v. Waldman (1924) 266 U. S. 113, 69 L. Ed. 195, 45 S. Ct. 85; *Mahler v. Eby (1924) 264 U. S. 32, 68 L. Ed. 549, 44 S. Ct. 283.

Board of General Appraisers (Treasury Department).

United States v. Fish (1925) 268 U. S. 607, 69 L. Ed. 1112, 45 S. Ct. 616.

Board of Tax Appeals.

*Kendrick Coal & Dock Co. v. Commissioner of Internal Revenue (C. C. A. 8th, 1928) 29 F. (2d) 559.

Federal Trade Commission.

Federal Trade Commission v. Standard Education Society (1937) 302 U. S. 112, 82 L. Ed. 141, 58 S. Ct. 113, rehearing denied 302 U. S. 779, 82 L. Ed. 602, 58 S. Ct. 365; Federal Trade Commission v. Klesner (1929) 280 U. S. 19, 74 L. Ed. 138, 50 S. Ct. 1, 68 A. L. R. 838; Ohio Leather Co. v. Federal Trade Commission (C. C. A. 6th, 1930) 45 F. (2d) 39; Philip Carey Mfg. Co. v. Federal Trade Commission (C. C. A. 6th, 1928) 29 F. (2d) 49.

Interstate Commerce Commission.

Powell v. United States (1937) 300 U. S. 276, 81 L. Ed. 643, 57 S. Ct. 470; Chesapeake & O. R. Co. v. United States (1935) 296 U. S. 187, 80 L. Ed. 147, 56 S. Ct. 164; Atchison, T. & S. F. R. Co. v. United States (1935) 295 U. S. 193, 79 L. Ed. 1382, 55 S. Ct. 748; United States v. Chicago, M., St. P. & P. R. Co. (1935) 294 U. S. 499, 79 L. Ed. 1023, 55 S. Ct. 462; Great Northern R. Co. v. Sullivan (1935) 294 U. S. 458, 79 L. Ed. 992, 55 S. Ct. 472; *United States v. Baltimore & O. R. Co. (1935) 293 U. S. 454, 79 L. Ed. 587, 55 S. Ct. 268; United States v. Louisiana (1933) 290 U. S. 70, 78 L. Ed. 181, 54 S. Ct. 28; Florida v. United States (1931) 282 U. S. 194, 75 L. Ed. 291, 51 S. Ct. 119; Brimstone Railroad & Canal Co. v. United States (1928) 276 U. S. 104, 72 L. Ed. 487,

questions are quasi-jurisdictional in character and must be made as a condition precedent to administrative action.¹² This rule presents a

48 S. Ct. 282; *Virginian Ry. Co. v. United States* (1926) 272 U. S. 658, 71 L. Ed. 463, 47 S. Ct. 222; *Nashville, C. & St. L. R. Co. v. Tennessee* (1923) 262 U. S. 318, 67 L. Ed. 999, 43 S. Ct. 583; *Philadelphia & R. R. Co. v. United States* (1916) 240 U. S. 334, 60 L. Ed. 675, 36 S. Ct. 354; *Houston, E. & W. T. R. Co. v. United States* (1914) 234 U. S. 342, 58 L. Ed. 1341, 34 S. Ct. 833; *Interstate Commerce Commission v. Chicago, B. & Q. R. Co.* (1902) 186 U. S. 320, 46 L. Ed. 1182, 22 S. Ct. 824; *Charles Needing Trucking Co. v. United States* (D. C. D. N. J., 1939) 29 F. Supp. 537. See *Texas v. United States* (1934) 292 U. S. 522, 78 L. Ed. 1402, 54 S. Ct. 819; *Missouri Pac. R. Co. v. United States* (D. C. E. D. Mo., E. Div., 1936) 16 F. Supp. 752.

National Bituminous Coal Commission.

Sunshine Anthracite Coal Co. v. National Bituminous Coal Commission (C. C. A. 8th, 1939) 105 F. (2d) 559, cert. den. 308 U. S. 604, 84 L. Ed. 505, 60 S. Ct. 142, rehearing denied 308 U. S. 638, 84 L. Ed. 530, 60 S. Ct. 260.

National Labor Relations Board.

National Labor Relations Board v. National Motor Bearing Co. (C. C. A. 9th, 1939) 105 F. (2d) 652.

The President.

* *Panama Refining Co. v. Ryan* (1935) 293 U. S. 388, 79 L. Ed. 446, 55 S. Ct. 241.

State Agencies.

Chicago, St. P., M. & O. R. Co. v. Holmberg (1930) 282 U. S. 162, 75 L. Ed. 270, 51 S. Ct. 56; *Chicago, M. & St. P. R. Co. v. Public Utilities Commission* (1927) 274 U. S. 344, 71 L. Ed. 1085, 47 S. Ct. 604; *Morris v. Duby* (1927) 274 U. S. 135, 71 L. Ed. 966, 47 S. Ct. 548; * *Wichita Railroad & Light Co. v. Public Utilities Commission* (1922) 260 U. S. 48, 67 L. Ed. 124, 43 S. Ct. 51.

Quotations.

"The primary question of fact presented for determination was, as the report of the Commission states, 'whether the use of locomotives equipped with hand reverse gear, as compared with power reverse gear, causes unnecessary peril to life or limb.' The report discusses, at some length, the alleged advantages and disadvantages of the two classes of reverse gear and the expense which the proposed change would entail; and concludes with 'findings' that, to a certain extent, the change should be made. But whether the use of any or all types of steam locomotives 'equipped with hand reverse gear as compared with power reverse gear causes unnecessary peril to life or limb,' is left entirely to inference. This complete absence of 'the basic or essential findings required to support the Commission's order' renders it void. *Florida v. United States*, 282 U. S. 194, 215. Compare *Wichita Railroad & Light Co. v. Public Utilities Comm'n*, 260 U. S. 48, 58-59; *Mahler v. Eby*, 264 U. S. 32, 44-45." (Mr. Justice Brandeis in *United States v. Baltimore & O. R. Co.* (1935) 293 U. S. 454, 463, 464, 79 L. Ed. 587, 55 S. Ct. 268.)

"The proceeding we are considering is governed by § 13. That is the general section of the act comprehensively describing the duty of the Commission, vesting it with power to fix and order substituted new rates for existing rates. The power is expressly made to depend on the condition that after full hearing and investigation the Commission shall find existing rates to be unjust, unreasonable, unjustly discriminatory or unduly preferential. We conclude that a valid order of the Commission under the act

clear analogy to the requirement in judicial proceedings that a judgment upon a special verdict cannot be sustained unless the findings extend to all material issues.¹³

Hence, although they need not be formal,¹⁴ ultimate findings must be express, clear and precise,¹⁵ must appear specifically in the ad-

must contain a finding of fact after hearing and investigation, upon which the order is founded, and that for lack of such a finding, the order in this case was void.

"This conclusion accords with the construction put upon similar statutes in other States. Public Utilities Commission v. Springfield Gas & Electric Co., 291 Ill. 209; Public Utilities Commission v. Baltimore & Ohio Southwestern R. R. Co., 281 Ill. 405. Moreover, it accords with general principles of constitutional government. The maxim that a legislature may not delegate legislative power has some qualifications, as in the creation of municipalities, and also in the creation of administrative boards to apply to the myriad details of rate schedules the regulatory police power of the State. The latter qualification is made necessary in order that the legislative power may be effectively exercised. In creating such an administrative agency the legislature, to prevent its being a pure delegation of legislative power, must enjoin upon it a certain course of procedure and certain rules of decision in the performance of its function. It is a wholesome and necessary principle that such an agency must pursue the procedure and rules enjoined and show a substantial compliance therewith to give validity to its action. When, therefore, such an administrative agency is required as a condition precedent to an order, to make a finding of facts, the validity of the order must rest upon the needed finding. If it is lacking, the order is ineffective."

(Mr. Chief Justice Taft in *Wichita Railroad & Light Co. v. Public Utilities Commission* (1922) 260 U. S. 48, 58, 59, 67 L. Ed. 124, 43 S. Ct. 51.)

Law Review Article.

See Lewis A. Sigler in "The Problem of Apparently Unguided Administrative Discretion," (1934) 19 St. Louis L. Rev. 261.

12 Alien Cases.

See *Mahler v. Eby* (1924) 264 U. S. 32, 68 L. Ed. 549, 44 S. Ct. 283.

The President.

Panama Refining Co. v. Ryan (1935) 293 U. S. 388, 79 L. Ed. 446, 55 S. Ct. 241.

Interstate Commerce Commission.

United States v. Baltimore & O. R. Co. (1935) 293 U. S. 454, 79 L. Ed. 587, 55 S. Ct. 268.

State Agencies.

Wichita Railroad & Light Co. v. Public Utilities Commission (1922) 260 U. S. 48, 67 L. Ed. 124, 43 S. Ct. 51.

General References.

Quasi-jurisdictional findings, which are determinations of administrative questions, should not be confused with findings of jurisdictional fact as to the agency's authority, which are decisions of judicial questions and may be tried *de novo*. See § 262 et seq.

¹³ *United States v. Esnault-Pelterie* (1936) 299 U. S. 201, 81 L. Ed. 123, 57 S. Ct. 159.

¹⁴ *United States v. Baltimore & O. R. Co.* (1935) 293 U. S. 454, 79 L. Ed. 587, 55 S. Ct. 268; *United States v. Louisiana* (1933) 290 U. S. 70, 78 L. Ed. 181, 54 S. Ct. 28.

¹⁵ *United States v. Chicago, M., St. P. & P. R. Co.* (1935) 294 U. S. 499,

ministrative record,¹⁶ and cannot be supplied by implication from other parts of the administrative record¹⁷ or left to inference,¹⁸ at least in the absence of basic findings, or findings on circumstantial facts, which unmistakably compel the conviction that the ultimate fact has been found as a matter of substance.¹⁹ An ultimate finding which follows the language of the controlling statute cannot well be challenged as insufficient.²⁰ But this rule cannot apply where any extensive analysis of the basic findings of circumstantial facts would be required.²¹

For instance, the Boiler Inspection Act²² confers authority on the Interstate Commerce Commission to prescribe by rule specific devices or changes in equipment, only where these are required to remove "unnecessary peril to life or limb". When a commission report states that the question for determination is whether a hand-operated reverse gear, as compared with a power-operated gear, causes such peril; and concludes with "findings" that the change should be made, the order is void. Whether use of a hand-operated gear causes such peril is left entirely to inference, and there is thus a complete absence of the finding necessary to support the administrative sanction or to justify application of the statutory mandate.²³

79 L. Ed. 1023, 55 S. Ct. 462. See *Chicago, R. I. & P. R. Co. v. United States* (1927) 274 U. S. 29, 71 L. Ed. 911, 47 S. Ct. 486.

¹⁶ *Tod v. Waldman* (1924) 266 U. S. 113, 69 L. Ed. 195, 45 S. Ct. 85; *Mahler v. Eby* (1924) 264 U. S. 32, 68 L. Ed. 549, 44 S. Ct. 283; *Wichita Railroad & Light Co. v. Public Utilities Commission* (1922) 260 U. S. 48, 67 L. Ed. 124, 43 S. Ct. 51.

¹⁷ *Alien Cases*.

Tod v. Waldman (1924) 266 U. S. 113, 69 L. Ed. 195, 45 S. Ct. 85; *Mahler v. Eby* (1924) 264 U. S. 32, 68 L. Ed. 549, 44 S. Ct. 283.

Board of Tax Appeals.

* *Kendrick Coal & Dock Co. v. Commissioner of Internal Revenue* (C. C. A. 8th, 1928) 29 F. (2d) 559.

Interstate Commerce Commission.

Powell v. United States (1937) 300 U. S. 276, 81 L. Ed. 643, 57 S. Ct. 470; *United States v. Chicago, M.,*

St. P. & P. R. Co. (1935) 294 U. S. 499, 79 L. Ed. 1023, 55 S. Ct. 462.

State Agencies.

Wichita Railroad & Light Co. v. Public Utilities Commission (1922) 260 U. S. 48, 67 L. Ed. 124, 43 S. Ct. 51.

¹⁸ *United States v. Baltimore & O. R. Co.* (1935) 293 U. S. 454, 79 L. Ed. 587, 55 S. Ct. 268.

¹⁹ See *United States v. Esnault-Pelterie* (1936) 299 U. S. 201, 81 L. Ed. 123, 57 S. Ct. 159.

²⁰ See *United States v. Curtiss-Wright Export Corp.* (1936) 299 U. S. 304, 81 L. Ed. 255, 57 S. Ct. 216.

²¹ *United States v. Esnault-Pelterie* (1936) 299 U. S. 201, 81 L. Ed. 123, 57 S. Ct. 159.

²² 45 USCA 23.

²³ *United States v. Baltimore & O. R. Co.* (1935) 293 U. S. 454, 79 L. Ed. 587, 55 S. Ct. 268.

If in an administrative proceeding it should appear that no evidence can be adduced upon which the necessary quasi-jurisdictional findings could be based, the agency should forthwith dismiss the complaint and discontinue the proceeding.²⁴

A finding made in a separate proceeding may be the basis of an administrative order.²⁵

An agency is required to make findings applicable only to the situation before it and supporting its conclusions in the particular case. It is not required to draw a hard and fast line applicable to all future cases in all conceivable circumstances.²⁶

Whether there are findings which in legal theory support an administrative order is a judicial question.²⁷

§ 552. Some Statutory Requirements.

The Interstate Commerce Act originally required "findings of fact upon which the conclusions of the Commission are based."²⁸ As amended, the section requires that the Interstate Commerce Commission "state the conclusions . . . together with its decision."²⁹ This relieved the Interstate Commerce Commission from making comprehensive findings of fact similar to those required by Equity Rule 70½. But though formal and precise findings were not required, this did not remove the necessity of making quasi-jurisdictional findings essential to the constitutional and statutory validity of the order.³⁰ The necessity, likewise, for clear findings of fact made by the Board of Tax Appeals is not altered although by statute it is made optional with the Board whether it shall file "findings," an "opinion" or a "memorandum."³¹

There is a legal distinction between quasi-jurisdictional findings, which are indispensable to the validity of an order,³² and a "complete statement of the grounds of the [Interstate Commerce] Com-

²⁴ Federal Trade Commission v. Klesner (1929) 280 U. S. 19, 74 L. Ed. 138, 50 S. Ct. 1, 68 A. L. R. 838.

²⁵ United States v. Louisiana (1933) 290 U. S. 70, 78 L. Ed. 181, 54 S. Ct. 28.

²⁶ Sunshine Anthracite Coal Co. v. National Bituminous Coal Commission (C. C. A. 8th, 1939) 105 F. (2d) 559, cert. den. 308 U. S. 604, 84 L. Ed. 505, 60 S. Ct. 142, rehearing denied 308 U. S. 638, 84 L. Ed. 530, 60 S. Ct. 260.

²⁷ See § 437.

²⁸ Act of February 4, 1887, c. 104, § 14, 24 Stat. 384.

²⁹ 49 USCA 14 (1).

³⁰ United States v. Baltimore & O. R. Co. (1935) 293 U. S. 454, 79 L. Ed. 587, 55 S. Ct. 268.

³¹ Kendrick Coal & Dock Co. v. Commissioner of Internal Revenue (C. C. A. 8th, 1928) 29 F. (2d) 559.

³² Florida v. United States (1931) 282 U. S. 194, 75 L. Ed. 291, 51 S. Ct. 119.

mission's determination," which is desirable as an aid to the reviewing court,³³ but whose absence is not fatal to the validity of the order.³⁴

§ 553. The Necessity of Analyzing Findings.

Administrative "findings" of certain agencies sometimes mix determinations of fact and conclusions of law in such a way as to render analysis difficult, and judicial review a task so annoying for the court that it is easier to uphold the administrative action in general terms than to ascertain whether the essential findings of fact have been made, and if so, whether the correct rule of law has been applied to them.³⁵ Preceded by the significant phrase "We find as follows," statements taking any position acquire added stature. This practice has tended to blur the profound distinction between administrative and judicial questions, and demonstrates the necessity of applying fundamental criteria to "findings" in order to ascertain whether they determine administrative questions, subject to the doctrine of administrative finality, or merely venture a decision upon a judicial question which is always open for independent decision by an appropriate court acting judicially.³⁶ If the doctrines of separation of powers and supremacy of law are to prevail as a practical matter in complex present-day affairs, few things are more important than the necessity of making this analysis.

Where findings are more detailed than is necessary, there is no prejudicial defect. As long as the necessary findings are there, the rest can be treated as mere surplusage.³⁷

§ 554. Findings Not Required for Regulations or Orders of General Application Legislative in Character.

Legislation enacted by Congress has general application, and need

³³ *Beaumont, S. L. & W. R. Co. v. United States* (1930) 232 U. S. 74, 75 L. Ed. 221, 51 S. Ct. 1.

³⁴ *United States v. Baltimore & O. R. Co.* (1935) 293 U. S. 454, 79 L. Ed. 587, 55 S. Ct. 268.

³⁵ See § 423 et seq.

³⁶ *Helvering v. Tex-Penn Oil Co.* (1937) 300 U. S. 481, 81 L. Ed. 755, 57 S. Ct. 569; *Federal Trade Commission v. Curtis Pub. Co.* (1923) 260 U. S. 568, 67 L. Ed. 408, 43 S. Ct. 210;

Royal Farms Dairy v. Wallace (D. C. Md., 1934) 8 F. Supp. 975 (Secy. of Agriculture). See also §§ 41, 73 and 425.

³⁷ *Sunshine Anthracite Coal Co. v. National Bituminous Coal Commission* (C. C. A. 8th, 1939) 105 F. (2d) 559, cert. den. 308 U. S. 604, 84 L. Ed. 505, 60 S. Ct. 142, rehearing denied 308 U. S. 638, 84 L. Ed. 530, 60 S. Ct. 260.

not be based upon findings of fact, although more recent statutes often set out legislative findings.³⁸ Similarly, when an administrative agency acts in a purely legislative capacity by making a rule, regulation, or order of general application, it need not make findings.³⁹ For instance, an administrative agency can exercise the delegated legislative function of rule-making without first reporting the data upon which it decided that the proposed rule should be established, where authorized by statute to act in its discretion. In that event there is no requirement that it find facts upon which its authority to act is conditioned.⁴⁰ This rule has no application to quasi-judicial action, or to quasi-legislative action which is not of general application but is directed against particular parties.⁴¹

§ 555. When Either of Two Findings Sufficient.

Where two ultimate findings of fact are made, one that rates are unreasonably low, and the other that their maintenance constitutes undue prejudice and preference, if either finding is sustained by the evidence it provides adequate support for an appropriate rate order, even though the other finding be invalid.⁴²

³⁸ See, for instance, the Agricultural Adjustment Act of 1938, 7 USCA 1331, 1341, 1351.

³⁹ *Pacific States Box & Basket Co. v. White* (1935) 296 U. S. 176, 80 L. Ed. 138, 56 S. Ct. 159, 101 A. L. R. 853; *American Telephone & Telegraph Co. v. United States* (D. C. S. D. N. Y., 1936) 14 F. Supp. 121, aff'd 299 U. S. 232, 81 L. Ed. 142, 57 S. Ct. 170.

"It is contended that the order is void because the administrative body made no special findings of fact. But the statute did not require special findings; doubtless because the regulation authorized was general legislation, not an administrative order in the nature of a judgment directed against an individual concern. Compare *Wichita Railroad & Light Co. v. Public Utilities Comm'n*, 260 U. S. 48, 58-59;

Mahler v. Eby, 264 U. S. 32, 44; *Southern Ry. Co. v. Virginia*, 290 U. S. 190, 193, 194." (Mr. Justice Brandeis in *Pacific States Box & Basket Co. v. White* (1935) 296 U. S. 176, 186, 80 L. Ed. 138, 56 S. Ct. 159, 101 A. L. R. 853.)

⁴⁰ *American Telephone & Telegraph Co. v. United States* (D. C. S. D. N. Y., 1936) 14 F. Supp. 121, aff'd 299 U. S. 232, 81 L. Ed. 142, 57 S. Ct. 170.

⁴¹ See *Shields v. Utah Idaho C. R. Co.* (1938) 305 U. S. 177, 83 L. Ed. 111, 59 S. Ct. 160; *Arizona Grocery Co. v. Atchison, T. & S. F. R. Co.* (1932) 284 U. S. 370, 76 L. Ed. 348, 52 S. Ct. 183.

⁴² *Youngstown Sheet & Tube Co. v. United States* (D. C. N. D. Ohio, E. Div., 1934) 7 F. Supp. 33, aff'd 295 U. S. 476, 79 L. Ed. 1553, 55 S. Ct. 822.

§ 556. Findings Not Expressly Relied Upon May Not Be Considered.

Findings made in one administrative proceeding may not be relied upon to sustain an order made in a separate administrative proceeding when the order does not purport to be based upon them.⁴³ The rule would be otherwise where the agency expressly bases an order made in one administrative proceeding upon findings made in another administrative proceeding, subject to the requirements of procedural due process.⁴⁴

§ 557. Scope of Group Findings.

An order may be based on findings which treat as a group parties who are united in interest, without specific findings as to each individual party, provided that, as a matter of substance, the group findings support the order as to a particular complaining party.⁴⁵

§ 558. Findings May Not Exceed Jurisdiction: State Agencies and Interstate Commerce.

In prescribing intrastate rates for a utility doing both interstate and intrastate business, it is often essential that findings be made separating property and revenue into the two fields. This is important not simply as a theoretical allocation to two branches of the business. It is essential to the appropriate recognition of the competent governmental authority in each field of regulation.⁴⁶ But findings made by a state commission relating to the fairness of interstate rates do not determine such matters since they lie outside the jurisdiction of the state. And a reviewing district court cannot acquire jurisdiction to determine interstate matters where the validity of state administrative action is alone concerned.⁴⁷

§ 559. Illustrations of Requisite Findings.

The following few illustrations are given to illustrate the importance of quasi-jurisdictional findings.

⁴³ Powell v. United States (1937) 300 U. S. 276, 81 L. Ed. 643, 57 S. Ct. 471.

⁴⁴ See § 424 et seq.

⁴⁵ United States v. Louisiana (1933) 290 U. S. 70, 78 L. Ed. 181, 54 S. Ct. 28; Beaumont, S. L. & W. R. Co. v. United States (1930) 282

U. S. 74, 75 L. Ed. 221, 51 S. Ct. 1.

⁴⁶ Smith v. Illinois Bell Telephone Co. (1930) 282 U. S. 133, 75 L. Ed. 255, 51 S. Ct. 65.

⁴⁷ Smith v. Illinois Bell Telephone Co. (1930) 282 U. S. 133, 75 L. Ed. 255, 51 S. Ct. 65.

§ 560. — The Federal Trade Commission.

A cease and desist order of the Federal Trade Commission is valid if supported by findings, (1) that methods used are unfair, (2) that they are methods of competition in interstate commerce, and (3) that a proceeding by the commission to prevent the use of the methods appears to be in the interest of the public.⁴⁸ The third of the foregoing findings is essential under the Federal Trade Commission Act,⁴⁹ but not in a proceeding under the Sherman Act, which includes practices or contracts in direct restraint of trade, necessarily involving the public interest.⁵⁰ An order to cease and desist using any scheme of espionage must be supported by a finding upon substantial evidence that information secured by the methods attacked was unlawfully used to hinder or stifle competition.⁵¹ Under the Clayton Act the Federal Trade Commission must find that the act complained of will substantially lessen competition.⁵²

§ 561. — The Interstate Commerce Commission.

A mere general permission or suggestion of an agency concerning rates is not a finding.⁵³ In order to support a commission order as to stockyard charges there must be a definite finding as to where transportation ends, since the jurisdiction of the commission ends where transportation ends.⁵⁴ An order directing the cessation of discriminatory practices against an electrically operated carrier requires a finding that such carrier is engaged in the general business of transporting freight.⁵⁵

Since the mere existence of discrimination is not prohibited, a finding that discrimination exists cannot support a rate order of the commission. It must find that discrimination results in undue prejudice

⁴⁸ Federal Trade Commission v. Trade Commission (C. C. A. 6th, 1928) 29 F. (2d) 49.

⁴⁹ Royal Milling Co. (1933) 288 U. S. 212, 77 L. Ed. 706, 53 S. Ct. 335; Federal Trade Commission v. Wallace (C. C. A. 8th, 1935) 75 F. (2d) 733.

⁵⁰ Federal Trade Commission v. Klesner (1929) 280 U. S. 19, 74 L. Ed. 138, 50 S. Ct. 1, 68 A. L. R. 838; Federal Trade Commission v. Winsted Hosiery Co. (1922) 258 U. S. 483, 66 L. Ed. 729, 42 S. Ct. 384.

⁵¹ Toledo Pipe-Threading Machine Co. v. Federal Trade Commission (C. C. A. 6th, 1926) 11 F. (2d) 337.

⁵² Philip Carey Mfg. Co. v. Federal

⁵³ International Shoe Co. v. Federal Trade Commission (1930) 280 U. S. 291, 74 L. Ed. 431, 50 S. Ct. 89.

⁵⁴ Baltimore & O. R. Co. v. United States (D. C. D. N. J., 1930) 43 F. (2d) 603, aff'd 284 U. S. 195, 76 L. Ed. 243, 52 S. Ct. 109.

⁵⁵ Atchison, T. & S. F. R. Co. v. United States (1935) 295 U. S. 193, 79 L. Ed. 1382, 55 S. Ct. 748.

⁵⁶ Chicago, I. & L. R. Co. v. United States (1926) 270 U. S. 287, 70 L. Ed.

590, 46 S. Ct. 226.

to some person or locality, or to interstate commerce.⁵⁶ An order establishing joint through routes and rates must be supported by a finding that the joint routes are necessary in the public interest.⁵⁷ But existing joint rates may be altered by an order based on a finding that the old rates are unduly discriminatory.⁵⁸ An order directing a return to freight classifications formerly in use is supported by a finding that a new classification produced undue discrimination and preferences.⁵⁹ An order of the Commission directing payment of reparation to a shipper who was compelled to pay a domestic rate because of noncompliance with regulations promulgated by the Director-General of Railroads for obtaining transportation at a lower export rate requires a finding that the regulations were unreasonable.⁶⁰ When the Commission has found that certain railroads should be compensated for the use of their cars by other railroads, it may not order major railroads to permit free handling of their cars by short lines.⁶¹

§ 562. — The National Labor Relations Board.

A finding that there has been domination and interference by an employer with a union is sufficient to support an order disestablishing that union.⁶² An order commanding an employer to cease and desist from maintaining surveillance over a union is invalid in the absence of a finding that the surveillance interfered with the employees' rights or with labor organization.⁶³

§ 563. — State Agencies.

A finding that greater weights are destructive of roadways will support a highway commission's order reducing the maximum weight of trucks and loads on state highways.⁶⁴

⁵⁶ Nashville, C. & St. L. R. Co. v. Tennessee (1923) 262 U. S. 318, 67 L. Ed. 999, 43 S. Ct. 583; Philadelphia & R. R. Co. v. United States (1916) 240 U. S. 334, 60 L. Ed. 675, 36 S. Ct. 354.

⁵⁷ Virginian Ry. Co. v. United States (1926) 272 U. S. 658, 71 L. Ed. 463, 47 S. Ct. 222.

⁵⁸ Virginian Ry. Co. v. United States (1926) 272 U. S. 658, 71 L. Ed. 463, 47 S. Ct. 222.

⁵⁹ Cincinnati, H. & D. R. Co. v. Interstate Commerce Commission (1907) 206 U. S. 142, 51 L. Ed. 995,

27 S. Ct. 648.

⁶⁰ Mellon v. Erb (C. C. A. 9th, 1926) 13 F. (2d) 752.

⁶¹ Chicago, R. I. & P. R. Co. v. United States (1931) 284 U. S. 80, 76 L. Ed. 177, 52 S. Ct. 87.

⁶² National Labor Relations Board v. Newport News Shipbuilding & Dry Dock Co. (1939) 308 U. S. 241, 84 L. Ed. 219, 60 S. Ct. 203.

⁶³ National Labor Relations Board v. National Motor Bearing Co. (C. C. A. 9th, 1939) 105 F. (2d) 652.

⁶⁴ Morris v. Doby (1927) 274 U. S. 135, 71 L. Ed. 966, 47 S. Ct. 548.

CHAPTER 33

NECESSITY OF BASIC FINDINGS TO SUPPORT ULTIMATE FINDINGS

- § 564. The Requirement of Basic Findings.
- § 565. Background of the Requirement.
- § 566. Importance: Powers Not Conferred May Not Be Exerted Under Guise of Exercising a Lawful Power.
- § 567. Extent of the Requirement.
- § 568. Basic Findings Specially Required Where Ultimate Finding General in Nature.
- § 569. Basic Findings Sometimes Required by Statute.
- § 570. Basic Findings—Other Phrases.
- § 571. Exception to Rule Where No Order Made.
- § 572. Inferences from Basic Findings.
- § 573. Dissenting Administrative Opinion May Suggest Doubt as to Basic Findings.
- § 574. Illustrations of Basic Findings in Transportation Cases.

§ 564. The Requirement of Basic Findings.

An ultimate finding,¹ although grammatically fitting constitutional and statutory requirements for application of a statutory mandate, need not be taken at its face value. On the contrary, an ultimate finding is a mere conclusion, insufficient as a finding, unless supported by basic findings, that is, detailed statements of the pivotal, constitutive facts which furnish a concrete factual basis for the conclusory ultimate finding.²

¹ See § 550 et seq.

² Board of Tax Appeals.

See *Helvering v. Tex-Penn Oil Co.* (1937) 300 U. S. 481, 81 L. Ed. 755, 57 S. Ct. 569; *Winnett v. Helvering* (C. C. A. 9th, 1934) 68 F. (2d) 614; *Tricou v. Helvering* (C. C. A. 9th, 1933) 68 F. (2d) 280, cert. den. 292 U. S. 655, 78 L. Ed. 1503, 54 S. Ct. 865.

Court of Claims.

* *United States v. Esmault-Pelterie* (1936) 299 U. S. 201, 81 L. Ed. 123, 57 S. Ct. 159.

Federal Communications Commission.

* *Mackay Radio & Telegraph Co.*

v. Federal Communications Commission (1938) 68 App. D. C. 336, 97 F. (2d) 641; *Tri-State Broadcasting Co., Inc. v. Federal Communications Commission* (1938) 68 App. D. C. 292, 96 F. (2d) 564; * *Saginaw Broadcasting Co. v. Federal Communications Commission* (1938) 68 App. D. C. 282, 96 F. (2d) 554, cert. den. 305 U. S. 613, 83 L. Ed. 391, 59 S. Ct. 72.

Federal Trade Commission.

Federal Trade Commission v. Klesner (1929) 280 U. S. 19, 74 L. Ed. 138, 50 S. Ct. 1, 68 A. L. R. 838; *Goodyear Tire & Rubber Co. v. Federal Trade Commission* (C. C. A. 6th,

An ultimate finding that certain proposed rates would be "unreasonable" is a mere conclusion, insufficient as a finding, in the absence of

1939) 101 F. (2d) 620, cert. den. 308 U. S. 557, 84 L. Ed. 468, 60 S. Ct. 74. Interstate Commerce Commission.

Atlantic Coast Line R. Co. v. Florida (1935) 295 U. S. 301, 79 L. Ed. 1451, 55 S. Ct. 713, rehearing denied 295 U. S. 769, 79 L. Ed. 1710, 55 S. Ct. 911; Atchison, T. & S. F. R. Co. v. United States (1935) 295 U. S. 193, 79 L. Ed. 1382, 55 S. Ct. 748; *United States v. Chicago, M., St. P. & P. R. Co. (1935) 294 U. S. 499, 79 L. Ed. 1023, 55 S. Ct. 462; Chesapeake & O. R. Co. v. United States (1931) 283 U. S. 35, 75 L. Ed. 824, 51 S. Ct. 337; *Florida v. United States (1931) 282 U. S. 194, 75 L. Ed. 291, 51 S. Ct. 119; Beaumont, S. L. & W. R. Co. v. United States (1930) 282 U. S. 74, 75 L. Ed. 221, 51 S. Ct. 1; United States v. New York Cent. R. Co. (1924) 263 U. S. 603, 68 L. Ed. 470, 44 S. Ct. 212; Louisville & N. R. Co. v. United States (1916) 242 U. S. 60, 61 L. Ed. 152, 37 S. Ct. 61; Philadelphia & R. R. Co. v. United States (1916) 240 U. S. 334, 60 L. Ed. 675, 36 S. Ct. 354; *Great Northern R. Co. v. Minnesota ex rel. Railroad & Warehouse Commission (1915) 238 U. S. 340, 59 L. Ed. 1337, 35 S. Ct. 753; Du Bois v. Central R. Co. of New Jersey (D. C. D. N. J., 1938) 22 F. Supp. 469; *Baltimore & O. R. Co. v. United States (D. C. N. D. N. Y., 1937) 22 F. Supp. 533. See Southern Pac. Co. v. Interstate Commerce Commission (1911) 219 U. S. 433, 55 L. Ed. 283, 31 S. Ct. 288; Anchor Coal Co. v. United States (D. C. S. D. W. Va., 1928) 25 F. (2d) 462, appeal dismissed as moot 279 U. S. 812, 73 L. Ed. 971, 49 S. Ct. 262; Koppers Gas & Coke Co. v. United States (D. C. D. Minn., Third Div., 1935) 11 F. Supp. 467.

National Labor Relations Board.

National Labor Relations Board v. Newport News Shipbuilding & Dry Dock Co. (1939) 308 U. S. 241, 84 L. Ed. 219, 60 S. Ct. 203.

National Mediation Board.

Virginian Ry. Co. v. System Federation, R. E. D. (1937) 300 U. S. 515, 81 L. Ed. 789, 57 S. Ct. 592.

Railroad Labor Board.

See Brotherhood of Railway & Steamship Clerks, etc. v. Nashville, C. & St. L. Ry. Co. (C. C. A. 6th, 1937) 94 F. (2d) 97.

State Agencies.

Edison Light & Power Co. v. Driscoll (D. C. M. D. Pa., 1937) 21 F. Supp. 1; Oklahoma Gas & Electric Co. v. Corporation Commission of Oklahoma (D. C. W. D. Okla., 1932) 1 F. Supp. 966.

Quotations.

"The second report of the Commission is a long and discursive narrative. Two paragraphs at the end give the key to its meaning [200 I. C. C. 621, 622]:—

"We find that the proposed rates if permitted to become effective would lead to a disruption of the rate structure on coal in the Indiana and related areas, thus impairing the revenue of the carriers serving those areas and their ability to provide the adequate and efficient transportation service contemplated by section 15a of the act; that they would cause a disruption of the individual groups from which the rates are proposed; and that they would cause a disruption of the long-standing rate relation existing for competitive purposes, between the several Indiana groups.

"We find that the proposed rates would be unreasonable and in viola-

facts particularly stated which furnish a rational factual basis, adequate in legal theory, for the conclusion of unreasonableness.³ And an ultimate finding that intrastate rates result in "unjust discrimination"

tion of sections 1 (5) [which denounces unreasonable charges] and 15a (2) of the act [which has been summarized above].'

"The statement in the second of these paragraphs that the proposed rates would be 'unreasonable' must be read in the light of the report as a whole, and then appears as a conclusion insufficient as a finding unless supported by facts more particularly stated. Cf. *Florida v. United States*, supra, at p. 213; *Southern Pacific Co. v. Interstate Commerce Comm'n*, 219 U. S. 433, 449." (Mr. Justice Cardozo in *United States v. Chicago, M., St. P. & P. R. Co.* (1935) 294 U. S. 499, 505, 506, 79 L. Ed. 1023, 55 S. Ct. 462.)

"In the present instance, the Commission did not undertake to establish a statewide level of rates for the interstate transportation of logs, and in order to sustain the statewide order as to intrastate rates (as one needed to avoid an undue burden on the revenues of the carrier and a consequent interference with the maintenance of an adequate transportation system) it must appear that there are findings, supported by evidence, of the essential facts as to the particular traffic and revenue, and the effect of the intrastate rates, both as existing and as prescribed, upon the income of the carrier, which would justify that conclusion.

"In the paragraph, which we have quoted, containing the ultimate finding of the Commission with respect to the unjust discrimination caused by the existing intrastate rates as between persons and localities, there is a concluding clause that the intrastate rates result 'in unjust discrim-

ination against interstate commerce.' This general statement in the language of the statute, neither standing alone nor taken in its context, could be regarded as sufficient to support a statewide order from the standpoint of income, in the absence of supporting findings of fact as to the revenue from the traffic in question." (Mr. Chief Justice Hughes in *Florida v. United States* (1931) 282 U. S. 194, 212, 213, 75 L. Ed. 201, 51 S. Ct. 119.)

"These decisions show that a reviewing court cannot properly exercise its function upon findings of ultimate fact alone, but must require also findings of the basic facts which represent the determination of the administrative body as to the meaning of the evidence, and from which the ultimate facts flow. Such findings are, we think, just as necessary in cases involving the application of the statutory criterion of public convenience, interest, or necessity set up by the Communications Act, as in those cases which under the Interstate Commerce Act require the application of the standard of unjust discrimination, or in those cases which under state public utility statutes require the application of the criterion of public convenience and necessity." (Judge Stephens in *Saginaw Broadcasting Co. v. Federal Communications Commission* (1938) 68 App. D. C. 282, 96 F. (2d) 554, 561, cert. den. 305 U. S. 613, 83 L. Ed. 391, 59 S. Ct. 72.)

³ * *United States v. Chicago, M., St. P. & P. R. Co.* (1935) 294 U. S. 499, 79 L. Ed. 1023, 55 S. Ct. 462; *Baltimore & O. R. Co. v. United States* (D. C. N. D. N. Y., 1937) 22 F. Supp. 533.

against interstate commerce is a mere conclusion, insufficient as a finding, in the absence of basic findings on the essential facts as to the particular traffic and revenue and the effect of intrastate rates, both existing and prescribed, on the income of the carrier.⁴ Likewise findings of fact in the broad terms of "public convenience, interest or necessity," the criterion set up by section 319 (a) of the Federal Communications Act, are not enough to support an order of the Federal Communications Commission.⁵

§ 565. Background of the Requirement.

An important purpose of all findings is to enable the courts to discharge one proper function, that is to make sure that the administrative agency, in the discharge of its highly specialized and technical duties, has followed the statute.⁶ In the ordinary case a finding that a rate is "unreasonable" may conceal interpretations of law which will be hard to detect, and although there must be some compromise as to the statement of details, that does not excuse the absence of a statement as to the pivotal, constitutive facts necessary before a "reasonable" rate can be disregarded and a lower one substituted.⁷ As a conclusion, an ultimate finding that a rate is "unreasonable" may have been in fact justified, but in the absence of basic findings the court has no way of

⁴Florida v. United States (1931) 282 U. S. 194, 75 L. Ed. 291, 51 S. Ct. 119.

⁵"We ruled in Missouri Broadcasting Corporation v. Federal Communications Commission, 68 App. D. C. 154, 94 F. 2d 623, 1937, and again in Heitmeyer v. Federal Communications Commission, 68 App. D. C. 180, 95 F. 2d 91, 1937, that findings of fact in the broad terms of public convenience, interest, or necessity, the criterion set up by Section 319 (a) of the Act, were not sufficient to support an order of the Commission. We now rule that findings of fact, to be sufficient to support an order, must include what have been above described as the basic facts, from which the ultimate facts in the terms of the statutory criterion are inferred. It is not necessary for the Commission to recite the evidence, and it is not

necessary that it set out its findings in the formal style and manner customary in trial courts. It is enough if the findings be unambiguously stated, whether in narrative or numbered form, so that it appears definitely upon what basic facts the Commission reached the ultimate facts and came to its decision." (Judge Stephens in *Saginaw Broadcasting Co. v. Federal Communications Commission* (1938) 68 App. D. C. 282, 96 F. (2d) 554, 560, cert. den. 305 U. S. 613, 83 L. Ed. 391, 59 S. Ct. 72.)

⁶Baltimore & O. R. Co. v. United States (D. C. N. D. N. Y., 1937) 22 F. Supp. 533. The opinion by Judge Learned Hand in this case is one of the most illuminating on the subject.

⁷Baltimore & O. R. Co. v. United States (D. C. N. D. N. Y., 1937) 22 F. Supp. 533.

knowing it, and to decide without them the court would either have to abdicate its function to enforce the law, or substitute its own conclusions upon matters which only the agency is fitted to consider.⁸ What findings are basic is a practical matter; those are such which are needed to ascertain on what legal theory the agency has proceeded. And where these are absent an administrative order founded upon an ultimate finding alone is invalid and must be set aside.⁹ The legal theory can only be ascertained if the full factual situation is honestly disclosed.

§ 566. Importance: Powers Not Conferred May Not Be Exerted Under Guise of Exercising a Lawful Power.

The requirement of basic findings illustrates better than any other rule that an ordinary grammatical term describing a factual matter has also a legal meaning, which is its meaning under the provisions of the particular controlling statute. Unless the statute requires a specialized interpretation, the ordinary grammatical meaning is the legal meaning. The requirement is designed to guard against use of such terms as insincere or artificial labels permitting the exercise of powers not conferred. Words must be honestly and accurately used. If a standard term such as "unreasonable," "unjustly discriminatory," "public interest," "public convenience and necessity," "protection of investors," etc., could be given effect as a mere combination of letters without inquiring as to its true meaning and the applicability of that meaning to a particular factual situation, there would be no bounds to the assumption of power by administrative agencies. Constitutional limitations would in their turn become empty phrases. It would be impossible to prevent agencies from exercising power not conferred in order to effectuate personal whims, ulterior motives, or other extralegal considerations, under the guise of exercising lawful powers. Under our constitutional system this may not be done.¹⁰

To illustrate, an ultimate finding resting on basic findings dealing with matters not entrusted to the agency shows that the agency is at-

⁸ Baltimore & O. R. Co. v. United States (D. C. N. D. N. Y., 1937) 22 F. Supp. 533.

⁹ Baltimore & O. R. Co. v. United States (D. C. N. D. N. Y., 1937) 22 F. Supp. 533.

¹⁰ Southern Pac. Co. v. Interstate Commerce Commission (1911) 219 U. S. 433, 55 L. Ed. 283, 31 S. Ct. 288;

Interstate Commerce Commission v. Illinois Cent. R. Co. (1910) 215 U. S. 452, 54 L. Ed. 280, 30 S. Ct. 155; Anchor Coal Co. v. United States (D. C. S. D. W. Va., 1928) 25 F. (2d) 462, appeal dismissed as moot 279 U. S. 812, 73 L. Ed. 971, 49 S. Ct. 262. See Waite v. Maey (1918) 246 U. S. 606, 62 L. Ed. 892, 38 S. Ct. 395.

tempting to exert power not entrusted to it, and is not in legal theory supported by the basic finding.¹¹ So, where an ultimate finding of the Interstate Commerce Commission that certain rates are "unreasonable" is supported only by basic findings as to the effect of the rates on industrial conditions, the commission is attempting to regulate industrial conditions under the guise of regulating rates, a matter beyond its power, and an order based thereon must be set aside.¹² The Interstate Commerce Commission may not seek to protect particular industrial interests from a higher rate through the device of making an ultimate finding that the higher rate, reasonable in fact, is "unreasonable." This is an attempt to exercise a power not possessed under the guise of exercising a lawful power.¹³ And the Board of Tea Appeals may not exclude tea containing innocuous coloring matter by the mere expedient of making a regulation which states that such tea contravenes the statutory standards of purity, quality, or fitness for consumption.¹⁴

§ 567. Extent of the Requirement.

In accord with the general rule that findings cannot be supplied by implication from the administrative record, basic findings may not be supplied by implication from the evidence despite the presence of an ultimate finding.¹⁵ A court may never be called upon to examine

¹¹ *Anchor Coal Co. v. United States* (D. C. S. D. W. Va., 1928) 25 F. (2d) 462, appeal dismissed as moot 279 U. S. 812, 73 L. Ed. 971, 49 S. Ct. 262.

¹² *Anchor Coal Co. v. United States* (D. C. S. D. W. Va., 1928) 25 F. (2d) 462, appeal dismissed as moot 279 U. S. 812, 73 L. Ed. 971, 49 S. Ct. 262. See *Southern Pac. Co. v. Interstate Commerce Commission* (1911) 219 U. S. 433, 55 L. Ed. 283, 31 S. Ct. 288.

¹³ *Southern Pac. Co. v. Interstate Commerce Commission* (1911) 219 U. S. 433, 55 L. Ed. 283, 31 S. Ct. 288.

¹⁴ See *Waite v. Maey* (1918) 246 U. S. 606, 62 L. Ed. 892, 38 S. Ct. 395.

¹⁵ "We would not be understood as saying that there do not lurk in this report phrases or sentences suggestive of a different meaning. One gains at places the impression that the Commission looked upon the pro-

posed reduction as something more than a disruptive tendency; that it found unfairness in the old relation of parity between Brazil and Springfield; and that the new schedule in its judgment would confirm Milwaukee in the enjoyment of an undue proportion of the traffic. The difficulty is that it has not said so with the simplicity and clearness through which a halting impression ripens into reasonable certitude. In the end we are left to spell out, to argue, to choose between conflicting inferences. Something more precise is requisite in the quasi-jurisdictional findings of an administrative agency. *Beaumont, S. L. & W. Ry. Co. v. United States*, 282 U. S. 74, 86; *Florida v. United States*, 282 U. S. 194, 215. We must know what a decision means before the duty becomes ours to say whether it is right or wrong." (Mr. Justice

evidence in order to resolve opposing contentions as to what it shows or to spell out and state such conclusions of fact as it may permit.¹⁶ The court will not search the record to ascertain whether, by use of what there may be found, general and ambiguous statements in the report intended to serve as findings may by construction be given a meaning sufficiently definite and certain to constitute a valid basis for the order. In the absence of a finding of essential basic facts, the order cannot be sustained.¹⁷ It is an essential requirement that there be a rational and coherent relationship shown between basic facts and the ultimate facts, so that the ultimate findings flow logically from the basic findings.¹⁸

Where an agency considers a case on one theory, basic findings may not be taken to support an ultimate finding simply because, had the case been considered upon a different theory, they could have furnished a rational basis for another type of ultimate finding adequate to support the order.¹⁹ Thus an ultimate finding that certain intrastate rates discriminated unduly against interstate commerce is not supported by

Cardozo in *United States v. Chicago, M., St. P. & P. R. Co.* (1935) 294 U. S. 499, 510, 511, 79 L. Ed. 1023, 55 S. Ct. 462.)

"The question is not merely one of the absence of elaboration or of a suitably complete statement of the grounds of the Commission's determination, to the importance of which this Court has recently adverted (*The Beaumont, Sour Lake & Western Railway Company v. United States*, ante, p. 74), but of the lack of the basic or essential findings required to support the Commission's order. In the absence of such findings, we are not called upon to examine the evidence in order to resolve opposing contentions as to what it shows or to spell out and state such conclusions of fact as it may permit. The Commission is the fact-finding body and the Court examines the evidence not to make findings for the Commission but to ascertain whether its findings are properly supported. (Mr. Chief Justice Hughes in *Florida v. United States* (1931) 282

U. S. 194, 215, 75 L. Ed. 291, 51 S. Ct. 119.)

¹⁶ *Atlantic Coast Line R. Co. v. Florida* (1935) 295 U. S. 301, 79 L. Ed. 1451, 55 S. Ct. 713, rehearing denied 295 U. S. 769, 79 L. Ed. 1710, 55 S. Ct. 911; *Atchison, T. & S. F. R. Co. v. United States* (1935) 295 U. S. 193, 79 L. Ed. 1382, 55 S. Ct. 748; **Florida v. United States* (1931) 282 U. S. 194, 75 L. Ed. 291, 51 S. Ct. 119.

¹⁷ *Atchison, T. & S. F. R. Co. v. United States* (1935) 295 U. S. 193, 79 L. Ed. 1382, 55 S. Ct. 748; *Florida v. United States* (1931) 282 U. S. 194, 75 L. Ed. 291, 51 S. Ct. 119.

¹⁸ *Tri-State Broadcasting Co., Inc. v. Federal Communications Commission* (1938) 68 App. D. C. 292, 96 F. (2d) 564; **Saginaw Broadcasting Co. v. Federal Communications Commission* (1938) 68 App. D. C. 282, 96 F. (2d) 554, cert. den. 305 U. S. 613, 83 L. Ed. 391, 59 S. Ct. 72.

¹⁹ *Florida v. United States* (1931) 282 U. S. 194, 75 L. Ed. 291, 51 S. Ct. 119.

basic findings to the effect that the rates were not compensatory just because an ultimate finding, not made, to the effect that increased revenue was necessary to safeguard the national transportation system, could have been made.²⁰

But findings are not to be considered so mutually related and interdependent that if one basic finding fail for lack of substantial evidence, the order must fail. If the order is supported by other established facts and circumstances, which furnish a completely rational basis for the ultimate findings nothing is to be gained by a review of the evidence upon one point alone.²¹ Yet the mere presence of some basic findings is not necessarily enough. The question is whether there are enough to furnish a rational factual basis, adequate in legal theory, for the ultimate findings and so for the very purpose of the act.²²

The practice of setting out basic findings is always highly desirable, even where they are not essential to the validity of an ultimate finding.²³

§ 568. Basic Findings Specially Required Where Ultimate Finding General in Nature.

Where an administrative agency is authorized by statute to make an ultimate finding in such general terms as whether a matter is in the public "interest," for "public convenience, interest or necessity," or any other generally stated objective, basic findings are especially required.²⁴ These general terms do not, per se, portray true administrative questions. They do not describe a specific question of fact, such as the reasonableness of a rate, but are used rather to refer in omnibus fashion to all the factual matters which are prohibited or regulated by the policies, standards, and requirements laid down elsewhere in a particular controlling statute. They do not relate vaguely to the public welfare without any standard to guide determination, or confer

²⁰ *Florida v. United States* (1931) 282 U. S. 194, 75 L. Ed. 291, 51 S. Ct. 119.

²¹ *Youngstown Sheet & Tube Co. v. United States* (D. C. N. D. Ohio, E. Div., 1934) 7 F. Supp. 33, aff'd 295 U. S. 476, 79 L. Ed. 1553, 55 S. Ct. 822.

²² *National Labor Relations Board v. Newport News Shipbuilding & Dry Dock Co.* (1939) 308 U. S. 241, 84 L. Ed. 219, 60 S. Ct. 203; *Florida v. United States* (1931) 282 U. S. 194, 75 L. Ed. 291, 51 S. Ct. 119.

²³ *Virginian Ry. Co. v. System Federation, R. E. D.* (1937) 300 U. S. 515, 81 L. Ed. 789, 57 S. Ct. 592.

²⁴ *Federal Trade Commission v. Klesner* (1929) 280 U. S. 19, 74 L. Ed. 138, 50 S. Ct. 1, 68 A. L. R. 838; **Tri-State Broadcasting Co. v. Federal Communications Commission* (1938) 68 App. D. C. 292, 96 F. (2d) 564; **Saginaw Broadcasting Co. v. Federal Communications Commission* (1938) 68 App. D. C. 282, 96 F. (2d) 554, cert. den. 305 U. S. 613, 83 L. Ed. 391, 59 S. Ct. 72.

unlimited power. On the contrary they are given meaning and contour, and are limited, by the provisions of the Act which lay down those policies, standards and requirements.²⁵

In granting licenses the Federal Radio Commission (now superseded by the Federal Communications Commission) was required to act as "public convenience, interest or necessity" requires. This criterion was not to be interpreted as setting up a standard so indefinite as to confer an unlimited power. The requirement was to be interpreted by its context, that is, by the nature of radio transmission and reception, by the scope, character, and quality of services.²⁶ Part of such context is

25 Federal Communications Commission.

Federal Communications Commission v. Sanders Bros. Radio Station (1940) 309 U. S. 470, 84 L. Ed. 869, 60 S. Ct. 693, rehearing denied 309 U. S. 642, 698, 84 L. Ed. 1037, 60 S. Ct. 693; Mackay Radio & Telegraph Co. v. Federal Communications Commission (1938) 68 App. D. C. 336, 97 F. (2d) 641.

Federal Radio Commission.

Federal Radio Commission v. Nelson Brothers Bond & Mtg. Co. (1933) 289 U. S. 266, 77 L. Ed. 1166, 53 S. Ct. 627, 89 A. L. R. 406.

Federal Trade Commission.

Federal Trade Commission v. Klesner (1929) 280 U. S. 19, 74 L. Ed. 138, 50 S. Ct. 1, 68 A. L. R. 838.

Interstate Commerce Commission.

United States v. Lowden (1939) 308 U. S. 225, 84 L. Ed. 208, 60 S. Ct. 248; Chesapeake & O. R. Co. v. United States (1931) 283 U. S. 35, 75 L. Ed. 824, 51 S. Ct. 337.

Quotations.

"In New York Central Securities Corp. v. United States, 287 U. S. 12, we pointed out that the phrase 'public interest' in this section does not refer generally to matters of public concern apart from the public interest in the maintenance of an adequate rail transportation system; that it is used in a more restricted sense de-

fined by reference to the purposes of the Transportation Act of 1920, of which the section is a part and which, as had been recognized in earlier opinions of this Court, sought through the exercise of the new authority given to the Commission to secure a more adequate and efficient transportation system. See New England Divisions Cases, 261 U. S. 184; Dayton-Goose Creek Ry. Co. v. United States, 263 U. S. 456; Texas & Pacific Ry. Co. v. Gulf, C. & S. F. Ry. Co., 270 U. S. 266, 277. Thus restricted, the term public interest 'as used in the statute, is not a mere general reference to public welfare but as shown by the context and purposes of the Act has direct relation to adequacy of transportation service, to its essential conditions of economy and efficiency and to appropriate provision and best use of transportation facilities.' Texas v. United States, 292 U. S. 522, 531." (Mr. Justice Stone in United States v. Lowden (1939) 308 U. S. 225, 230, 84 L. Ed. 208, 60 S. Ct. 248.

²⁶ Federal Radio Commission v. Nelson Bros. Bond & Mtg. Co. (1933) 289 U. S. 266, 77 L. Ed. 1166, 53 S. Ct. 627, 89 A. L. R. 406; Mackay Radio & Telegraph Co. v. Federal Communications Commission (1938) 68 App. D. C. 336, 97 F. (2d) 641.

section 1 of the Communications Act,²⁷ but the act does not show that Congress has laid down any policy to the effect that competition between radio telegraph stations is in the "public interest," and hence a finding that the granting of a license is required by "public interest, convenience or necessity" within the meaning of that act, need not be supported by a basic finding that granting the license would create competition.²⁸ Similarly the Transportation Act of 1920²⁹ requires a railroad to obtain a certificate of "public convenience and necessity" before constructing a new line, and a finding of "public interest" before acquiring another by lease or stock purchase. The meaning of that language throws light on the meaning of "public interest, convenience or necessity" in the Communications Act of 1934.³⁰ The meaning of the term "public interest" within the meaning of the Transportation Act, when used in a finding by the Interstate Commerce Commission, is not a concept without ascertainable criteria, not a mere general reference to the public welfare without any standard to guide determination. It has direct relation to the specific policies, standards, and requirements laid down in the act, such as the adequacy of transportation service, essential conditions of economy and efficiency, and appropriate provision and best use of transportation facilities.³¹ By these policies Congress has recognized in the act that competition between carriers may result in harm to the public, as well as in benefit, and accordingly applications may be denied as not in the "public interest" where existing services were deemed reasonably adequate, where needless duplication of facilities would result, and where the traffic relied upon would be secured largely at the expense of other roads. Basic findings on such matters adequately support a finding respecting "public interest" within the meaning of the act.³²

There being no specification of the considerations by which an agency is to be governed in determining whether the "public convenience and necessity" require proposed construction of a railroad line, the controlling considerations are the policies, standards and requirements

²⁷ 47 USCA 151.

²⁸ Mackay Radio & Telegraph Co. v. Federal Communications Commission (1938) 68 App. D. C. 336, 97 F. (2d) 641.

²⁹ 49 USCA 1 (18-22), 5 (2), 20a (2).

³⁰ Mackay Radio & Telegraph Co. v. Federal Communications Commission (1938) 68 App. D. C. 336, 97 F. (2d) 641.

³¹ New York Central Securities Corp. v. United States (1932) 287 U. S. 12, 77 L. Ed. 138, 53 S. Ct. 45; Mackay Radio & Telegraph Co. v. Federal Communications Commission (1938) 68 App. D. C. 336, 97 F. (2d) 641.

³² Mackay Radio & Telegraph Co. v. Federal Communications Commission (1938) 68 App. D. C. 336, 97 F. (2d) 641.

specifically laid down elsewhere in the act. For instance, in the Transportation Act of 1920³³ a policy on the part of Congress to preserve competition among carriers is disclosed. Hence a finding of "public convenience and necessity" within the meaning of that act is adequately supported by a basic finding to the effect that competition will be preserved.³⁴ It is for the court to decide, from the policies, standards and requirements laid down in the act, what considerations are to govern the Commission in making the ultimate determination, even though these are not specified as such in the Act.³⁵

The Communications Act of 1934, although disclosing no policy on the part of Congress to create competition between radio telegraph stations, has not, as in the case of railroads, abandoned its policy or principle of free competition respecting radio broadcasting stations. It sets forth no policy of protecting a licensee against competition.³⁶ Hence to find that "public convenience, interest, or necessity" requires that a broadcasting license be granted to one station does not require a basic finding that it will not work economic injury to a competing station.³⁷

An ultimate finding under the Federal Trade Commission Act that certain action will be "to the interest of the public" must be supported by basic findings, such as those showing that an unfair method is employed under circumstances which involve flagrant oppression of the weak by the strong; that the aggregate loss entailed may be so serious and widespread as to make the matter one of public consequence; or that competition is substantial and may be substantially lessened by the unfair trade practices in question.³⁸ But a basic finding that it is to the interest of the community generally that private rights shall be respected is not enough to support a finding that the proceeding is "to the interest of the public" within the meaning of the Federal Trade Commission Act.³⁹

³³ 49 USCA 5 (4).

³⁴ *Chesapeake & O. R. Co. v. United States* (1931) 283 U. S. 35, 75 L. Ed. 824, 51 S. Ct. 337.

³⁵ *Chesapeake & O. R. Co. v. United States* (1931) 283 U. S. 35, 75 L. Ed. 824, 51 S. Ct. 337.

³⁶ *Federal Communications Commission v. Sanders Bros. Radio Station* (1940) 309 U. S. 470, 84 L. Ed. 869, 60 S. Ct. 693, rehearing denied 309 U. S. 642, 698, 84 L. Ed. 1037, 60 S. Ct. 693.

³⁷ *Federal Communications Commission v. Sanders Bros. Radio Station* (1940) 309 U. S. 470, 84 L. Ed. 869, 60 S. Ct. 693, rehearing denied 309 U. S. 642, 698, 84 L. Ed. 1037, 60 S. Ct. 693.

³⁸ *International Shoe Co. v. Federal Trade Commission* (1930) 280 U. S. 291, 74 L. Ed. 431, 50 S. Ct. 89.

³⁹ *Federal Trade Commission v. Klesner* (1929) 280 U. S. 19, 74 L. Ed. 138, 50 S. Ct. 1, 68 A. L. R. 838.

The phrase "protection of investors" which recurs repeatedly in statutes administered by the Securities and Exchange Commission, likewise is not a vague reference to the public welfare, but is limited in meaning to the policies laid down specifically and concretely in the particular act.⁴⁰

§ 569. Basic Findings Sometimes Required by Statute.

Basic findings are sometimes specifically required by statute, particularly where an agency is required to consider certain factors in making a particular determination.⁴¹ Thus in prescribing a division of joint rates the Interstate Commerce Commission must consider the efficiency with which the carriers involved are operated, the amount of revenue respectively required to pay their respective operating expenses, taxes, and a fair return on their railway property held for and used in the service of transportation, and the importance to the public of the transportation services of the carriers.⁴²

§ 570. Basic Findings—Other Phrases.

Other phrases used synonymously with basic findings are "facts more particularly stated,"⁴³ "the facts supporting the conclusion,"⁴⁴ "basic facts,"⁴⁵ "established facts,"⁴⁶ "specific facts found,"⁴⁷ "supporting facts,"⁴⁸ "findings of fact,"⁴⁹ "findings of essential basic

⁴⁰ See James M. Landis in "The Administrative Process" (1938) p. 66.

⁴¹ *Brimstone Railroad & Canal Co. v. United States* (1928) 276 U. S. 104, 72 L. Ed. 487, 48 S. Ct. 282.

⁴² ⁴⁹ *USCA 15 (6). Brimstone Railroad & Canal Co. v. United States* (1928) 276 U. S. 104, 72 L. Ed. 487, 48 S. Ct. 282.

⁴³ *United States v. Chicago, M. & St. P. R. Co.* (1935) 294 U. S. 499, 79 L. Ed. 1023, 55 S. Ct. 462.

⁴⁴ *Atlantic Coast Line R. Co. v. Florida* (1935) 295 U. S. 301, 79 L. Ed. 1451, 55 S. Ct. 713, rehearing denied 295 U. S. 769, 79 L. Ed. 1710, 55 S. Ct. 911.

⁴⁵ *Atchison, T. & S. F. R. Co. v. United States* (1935) 295 U. S. 193, 79 L. Ed. 1382, 55 S. Ct. 748.

⁴⁶ *Youngstown Sheet & Tube Co. v. United States* (D. C. N. D. Ohio, E. Div., 1934) 7 F. Supp. 33, aff'd 295 U. S. 476, 79 L. Ed. 1553, 55 S. Ct. 822.

⁴⁷ *United States v. New York Cent. R. Co.* (1924) 263 U. S. 603, 68 L. Ed. 470, 44 S. Ct. 212.

⁴⁸ *Virginian Ry. Co. v. System Federation, R. E. D.* (1937) 300 U. S. 515, 81 L. Ed. 789, 57 S. Ct. 592.

⁴⁹ *Federal Radio Commission v. Nelson Bros. Bond & Mtg. Co.* (1933) 289 U. S. 266, 77 L. Ed. 1166, 53 S. Ct. 627, 89 A. L. R. 406.

facts''⁵⁰ "definite findings''⁵¹ "subsidiary finding,"⁵² "subsidiary findings of fact,"⁵³ or that the "finding must be explicitly set out."⁵⁴

§ 571. Exception to Rule Where No Order Made.

An administrative order must be supported by findings as a condition precedent to administrative action, in accordance with the requirements for delegation of legislative power.⁵⁵ It is because of the making of a direction in an administrative order that the requirement of basic findings becomes essential.⁵⁶ Hence basic findings are not essential to the validity of an ultimate finding where no order or administrative sanction has been made.⁵⁷ For instance, where enforcement of the statutory mandate is left to the courts upon the initiative of a private party in reliance upon an ultimate finding,⁵⁸ in the absence of an administrative order or direction based on an ultimate finding, the latter is considered to be *prima facie* correct and will be upheld judicially unless rebutted by appropriate proof.⁵⁹ In this situation an ultimate finding may not be conclusive upon the courts under the doctrine of administrative finality in the absence of basic findings. The court may itself inquire as to any omitted facts.⁶⁰ The burden of proof is on the contesting party to establish that an ultimate finding which conforms in terms to the statutory requirement is invalid for want of the requisite supporting or basic facts.⁶¹

⁵⁰ *Atchison, T. & S. F. R. Co. v. United States* (1935) 295 U. S. 193, 79 L. Ed. 1382, 55 S. Ct. 748.

⁵¹ *Atchison, T. & S. F. R. Co. v. United States* (1935) 295 U. S. 193, 79 L. Ed. 1382, 55 S. Ct. 748.

⁵² *National Labor Relations Board v. Newport News Shipbuilding & Dry Dock Co.* (1939) 308 U. S. 241, 84 L. Ed. 219, 60 S. Ct. 203.

⁵³ *National Licorice Co. v. National Labor Relations Board* (1940) 309 U. S. 350, 84 L. Ed. 799, 60 S. Ct. 569.

⁵⁴ *Virginian Ry. Co. v. System Federation, R. E. D.* (1937) 300 U. S. 515, 81 L. Ed. 789, 57 S. Ct. 592.

⁵⁵ See § 550 et seq.

⁵⁶ *Consolidated Edison Co. v. National Labor Relations Board* (1938) 305 U. S. 197, 83 L. Ed. 126, 59 S. Ct. 206; *Atlantic Coast Line R. Co. v.*

Florida (1935) 295 U. S. 301, 79 L. Ed. 451, 55 S. Ct. 713, rehearing denied 295 U. S. 769, 79 L. Ed. 1710, 55 S. Ct. 911; *Atchison, T. & S. F. R. Co. v. United States* (1935) 295 U. S. 193, 79 L. Ed. 1382, 55 S. Ct. 748.

⁵⁷ *Virginian Ry. Co. v. System Federation, R. E. D.* (1937) 300 U. S. 515, 81 L. Ed. 789, 57 S. Ct. 592.

⁵⁸ *Railway Labor Act*, 45 USCA 151-163.

⁵⁹ *Virginian Ry. Co. v. System Federation, R. E. D.* (1937) 300 U. S. 515, 81 L. Ed. 789, 57 S. Ct. 592.

⁶⁰ *Virginian Ry. Co. v. System Federation, R. E. D.* (1937) 300 U. S. 515, 81 L. Ed. 789, 57 S. Ct. 592.

⁶¹ *Virginian Ry. Co. v. System Federation, R. E. D.* (1937) 300 U. S. 515, 81 L. Ed. 789, 57 S. Ct. 592.

The question whether an ultimate finding which is supported by basic findings is conclusive, that is, is subject to the rule of administrative finality, where no order may be made by an agency, has been expressly left open.⁶²

§ 572. Inferences from Basic Findings.

Where basic findings reasonably support an ultimate finding a reviewing court will not inspect them to determine whether the probative facts stated in the basic findings might lead to a different conclusion as to the ultimate fact.⁶³ Generally findings of ultimate facts may not be overcome, impeached, controlled, limited or modified by statements in the basic findings which reasonably support, by inference and deduction, the ultimate findings.⁶⁴ But evidentiary facts contained in basic findings may overcome a finding of ultimate facts if they compel an opposite conclusion as a matter of law.⁶⁵

§ 573. Dissenting Administrative Opinion May Suggest Doubt as to Basic Findings.

A wide difference of opinion among members of an administrative agency, as shown where four members dissented, may suggest doubt as to some basic findings of fact.⁶⁶

§ 574. Illustrations of Basic Findings in Transportation Cases.

In the fixing of rates for a group of carriers it is not essential that the reasonableness of each individual rate be made the separate subject of a finding.⁶⁷ Likewise the Commission may declare a joint or combination through rate unreasonable without passing upon the reasonableness of the local rates which compose it.⁶⁸ Findings as to line haul cost, on which through rates are based, need not be supported by specific find-

⁶² *Virginian Ry. Co. v. System Federation*, R. E. D. (1937) 300 U. S. 515, 81 L. Ed. 789, 57 S. Ct. 592.

See, however, *Shields v. Utah Idaho C. R. Co.* (1938) 305 U. S. 177, 83 L. Ed. 111, 59 S. Ct. 160.

⁶³ *Tricon v. Helvering* (C. C. A. 9th, 1933) 68 F. (2d) 280, cert. den. 292 U. S. 655, 78 L. Ed. 1503, 54 S. Ct. 865. See *Winnett v. Helvering* (C. C. A. 9th, 1934) 68 F. (2d) 614.

⁶⁴ *Winnett v. Helvering* (C. C. A. 9th, 1934) 68 F. (2d) 614.

⁶⁵ See *Tricon v. Helvering* (C. C. A. 9th, 1933) 68 F. (2d) 280, cert. den. 292 U. S. 655, 78 L. Ed. 1503, 54 S. Ct. 865. See also § 566.

⁶⁶ *Baltimore & O. R. Co. v. United States* (1936) 298 U. S. 349, 80 L. Ed. 1209, 56 S. Ct. 797.

⁶⁷ *United States v. Louisiana* (1933) 290 U. S. 70, 78 L. Ed. 181, 54 S. Ct. 28.

⁶⁸ *Atlantic & Y. Ry. Co. v. Carolina Button Corp.* (C. C. A. 4th, 1935) 74 F. (2d) 870.

ings as to the cost of individual elements in the line haul,⁶⁹ even where, as in the case of a charge for ferriage at the end of a route, the particular cost is distinguishable and in a sense additional.⁷⁰

A finding that a shipper has been damaged must be supported by a finding that the rate paid was unjust.⁷¹ Consideration of cost alone will not demonstrate that a rate is unjust, and hence an appropriate finding should allow for a reasonable profit.⁷²

A finding of discrimination must be supported by basic findings, particularly a finding that intrastate rates discriminate against interstate commerce.⁷³ It is not enough to find that intrastate rates are unreasonably low,⁷⁴ or to state the conclusion that interstate commerce is unjustly affected.⁷⁵ It is necessary to find the facts supporting the conclusion, as for instance, that the revenues of interstate commerce would probably be increased if the rate for intrastate hauls were established at a higher level,⁷⁶ or other essential facts as to the particular traffic and revenue and effect of intrastate rates on the income of the carrier.⁷⁷

⁶⁹ Louisiana Public Service Commission v. Texas & N. O. R. Co. (1931) 284 U. S. 125, 76 L. Ed. 201, 52 S. Ct. 74.

⁷⁰ Louisiana Public Service Commission v. Texas & N. O. R. Co. (1931) 284 U. S. 125, 76 L. Ed. 201, 52 S. Ct. 74.

⁷¹ Great Northern R. Co. v. Sullivan (1935) 294 U. S. 458, 79 L. Ed. 992, 55 S. Ct. 472.

⁷² Southern R. Co. v. St. Louis Hay & Grain Co. (1909) 214 U. S. 297, 53 L. Ed. 1004, 29 S. Ct. 678.

⁷³ Florida v. United States (1934) 292 U. S. 1, 78 L. Ed. 1077, 54 S. Ct. 603; Louisiana Public Service Commission v. Texas & N. O. R. Co. (1931) 284 U. S. 125, 76 L. Ed. 201, 52 S. Ct. 74; Florida v. United States

(1931) 282 U. S. 194, 75 L. Ed. 291, 51 S. Ct. 119.

⁷⁴ Atlantic Coast Line R. Co. v. Florida (1935) 295 U. S. 301, 79 L. Ed. 451, 55 S. Ct. 713; Florida v. United States (1931) 282 U. S. 194, 75 L. Ed. 291, 51 S. Ct. 119.

⁷⁵ Atlantic Coast Line R. Co. v. Florida (1935) 295 U. S. 301, 79 L. Ed. 1451, 55 S. Ct. 713; Florida v. United States (1931) 282 U. S. 194, 75 L. Ed. 291, 51 S. Ct. 119.

⁷⁶ Atlantic Coast Line R. Co. v. Florida (1935) 295 U. S. 301, 79 L. Ed. 1451, 55 S. Ct. 713.

⁷⁷ Florida v. United States (1931) 282 U. S. 194, 75 L. Ed. 291, 51 S. Ct. 119; Houston, E. & W. T. R. Co. v. United States (1914) 234 U. S. 342, 58 L. Ed. 1341, 34 S. Ct. 833.

CHAPTER 34

NECESSITY OF SUBSTANTIAL EVIDENCE TO SUPPORT FINDINGS

- § 575. The Substantial Evidence Rule.
- § 576. Rule Inapplicable Where All Evidence Not Set Forth in Administrative Record.
- § 577. When Claim of Lack of Substantial Evidence May Not Be Made.
- § 578. Collateral Attack.
- § 579. Admission of Incompetent Evidence Immaterial: Informal Proof.
- § 580. —Absence of Testimony by Some Parties Not a Defect.
- § 581. State Cases: Application of Rule by State Court Final.
- § 582. Rule Does Not Apply to Judicial Questions Including Mixed Questions of Law and Fact.
- § 583. Substantial Evidence—Other Phrases.
- § 584. Extent of Court's Right to Search for Presence of Substantial Evidence.
- § 585. —Special Extension of This Power in Federal Trade Commission Cases.
- § 586. What Constitutes Substantial Evidence.
- § 587. —Evidence Taken in Investigatory Proceeding.
- § 588. —Interrogation of Prisoner in Alien Cases.
- § 589. —Silence May Be Evidence.
- § 590. —Typical Evidence.
- § 591. —In Rate Cases.
- § 592. —Evidence as to One Part of Through Rate Competent as to Another Part and as to the Through Rate.
- § 593. —Relevance of Net Income Upon Issue of Reasonableness.
- § 594. Risks from Refusal to Present Evidence.
- § 595. When Findings Prima Facie Evidence Only: Statutory Provisions.

§ 575. The Substantial Evidence Rule.

An administrative finding on an administrative question is conclusive if supported by substantial evidence.¹ This is to say that, as a

¹ Alien Cases.

Kessler v. Strecker (1939) 307 U. S. 22, 83 L. Ed. 1082, 59 S. Ct. 694; Costanzo v. Tillinghast (1932) 287 U. S. 341, 77 L. Ed. 350, 53 S. Ct. 152; Kwock Jan Fat v. White (1920) 253 U. S. 454, 64 L. Ed. 1010, 40 S. Ct. 566; Lewis v. Frick (1914) 233 U. S. 291, 58 L. Ed. 967, 34 S. Ct. 488; *Zakonaite v. Wolf (1912) 226 U. S.

272, 57 L. Ed. 218, 33 S. Ct. 31; United States ex rel. Squillari v. Day (C. C. A. 3d, 1929) 35 F. (2d) 284; United States ex rel. Coria v. Com'r of Immigration (D. C. S. D. N. Y., 1938) 25 F. Supp. 569; United States ex rel. Fortmueller v. Com'r of Immigration (D. C. S. D. N. Y., 1936) 14 F. Supp. 484.

requirement of law, there must be a rational basis in evidence for the

Board of Tax Appeals.

Helvering v. Kehoe (1940) 309 U. S. 277, 84 L. Ed. 751, 60 S. Ct. 549; *Helvering v. F. & R. Lazarus & Co.* (1939) 308 U. S. 252, 84 L. Ed. 226, 60 S. Ct. 209; *Colorado Nat. Bank v. Commissioner of Internal Revenue* (1938) 305 U. S. 23, 83 L. Ed. 20, 59 S. Ct. 48; *Helvering v. Tex-Penn Oil Co.* (1937) 300 U. S. 481, 81 L. Ed. 755, 57 S. Ct. 569; *Elmhurst Cemetery Co. of Joliet v. Commissioner of Internal Revenue* (1937) 300 U. S. 37, 81 L. Ed. 491, 57 S. Ct. 324; **Helvering v. Rankin* (1935) 295 U. S. 123, 79 L. Ed. 1343, 55 S. Ct. 732; *Burnet v. Leininger* (1932) 285 U. S. 136, 76 L. Ed. 665, 52 S. Ct. 345; *Phillips v. Commissioner of Internal Revenue* (1931) 283 U. S. 89, 75 L. Ed. 1289, 51 S. Ct. 608.

Commissioner of Internal Revenue.

Morgenthau v. Mifflin Chemical Corp. (C. C. A. 3d, 1937) 93 F. (2d) 82, rehearing denied (1938) 94 F. (2d) 550.

Commissioner of Prohibition.

Roge Laboratories v. Doran (1931) 60 App. D. C. 51, 47 F. (2d) 413; *Quitt v. Stone* (C. C. A. 4th, 1931) 46 F. (2d) 405, cert. den. 283 U. S. 839, 75 L. Ed. 1450, 51 S. Ct. 487; **Herbert v. Anstine* (C. C. A. 4th, 1930) 37 F. (2d) 552.

Court of Claims.

United States v. Clark (1877) 96 U. S. 37, 24 L. Ed. 696.

Federal Alcohol Administration.

Atlanta Beer Distributing Co. v. Alexander (C. C. A. 5th, 1937) 93 F. (2d) 11, cert. den. 303 U. S. 644, 82 L. Ed. 1106, 58 S. Ct. 645.

Federal Communications Commission.

Courier Post Pub. Co. v. Federal Communications Commission (1939) 70 App. D. C. 80, 104 F. (2d) 213; *Missouri Broadcasting Co. v. Federal*

Communications Commission (1937) 68 App. D. C. 154, 94 F. (2d) 623, cert. den. 303 U. S. 655, 82 L. Ed. 1115, 58 S. Ct. 759; *Radio Service Corp. v. Federal Communications Commission* (1935) 64 App. D. C. 323, 78 F. (2d) 207.

Federal Trade Commission.

Federal Trade Commission v. Standard Education Society (1937) 302 U. S. 112, 82 L. Ed. 141, 58 S. Ct. 113, rehearing denied 302 U. S. 779, 82 L. Ed. 602, 58 S. Ct. 365; *Federal Trade Commission v. Algoma Lumber Co.* (1934) 291 U. S. 67, 78 L. Ed. 655, 54 S. Ct. 315; *International Shoe Co. v. Federal Trade Commission* (1930) 280 U. S. 291, 74 L. Ed. 431, 50 S. Ct. 89; *Federal Trade Commission v. Klesner* (1929) 280 U. S. 19, 74 L. Ed. 138, 50 S. Ct. 1, 68 A. L. R. 838; *Federal Trade Commission v. Artloom Corp.* (C. C. A. 3d, 1934) 69 F. (2d) 36; *Lighthouse Rug Co. v. Federal Trade Commission* (C. C. A. 7th, 1929) 35 F. (2d) 163.

Interstate Commerce Commission.

Shields v. Utah Idaho C. R. Co. (1938) 305 U. S. 177, 83 L. Ed. 111, 59 S. Ct. 160; *United States v. Pan American Petroleum Corp.* (1938) 304 U. S. 156, 82 L. Ed. 1262, 58 S. Ct. 771; *United States v. American Sheet & Tin Plate Co.* (1937) 301 U. S. 402, 81 L. Ed. 1186, 57 S. Ct. 804; *Chesapeake & O. R. Co. v. United States* (1935) 296 U. S. 187, 80 L. Ed. 147, 56 S. Ct. 164; *Illinois Commerce Commission v. United States* (1934) 292 U. S. 474, 78 L. Ed. 1371, 54 S. Ct. 783; *Mississippi Valley Barge Line Co. v. United States* (1934) 292 U. S. 282, 78 L. Ed. 1260, 54 S. Ct. 692; *Florida v. United States* (1934) 292 U. S. 1, 78 L. Ed. 1077, 54 S. Ct. 603; *Claiborne-Annapolis Ferry Co. v. United States* (1932) 285 U. S. 382, 76 L. Ed. 808, 52 S. Ct. 440; *Mer-*

conclusions approved by the administrative agency.² Many statutes

chants Warehouse Co. v. United States (1931) 233 U. S. 501, 75 L. Ed. 1227, 51 S. Ct. 505; Baltimore & O. R. Co. v. United States (1928) 277 U. S. 291, 72 L. Ed. 885, 48 S. Ct. 520; Virginian Ry. Co. v. United States (1926) 272 U. S. 658, 71 L. Ed. 463, 47 S. Ct. 222; Western Paper Makers' Chemical Co. v. United States (1926) 271 U. S. 268, 70 L. Ed. 941, 46 S. Ct. 500; Northern Pac. R. Co. v. Department of Public Works (1925) 268 U. S. 39, 69 L. Ed. 837, 45 S. Ct. 412; United States v. Ablene & S. R. Co. (1924) 265 U. S. 274, 68 L. Ed. 1016, 44 S. Ct. 565; United States v. Illinois Cent. R. Co. (1924) 263 U. S. 515, 68 L. Ed. 417, 44 S. Ct. 189; The New England Divisions Case (1923) 261 U. S. 184, 67 L. Ed. 605, 43 S. Ct. 270; Manufacturers R. Co. v. United States (1918) 246 U. S. 457, 62 L. Ed. 831, 38 S. Ct. 383; Louisville & N. R. Co. v. United States (1918) 245 U. S. 463, 62 L. Ed. 400, 38 S. Ct. 141; Louisville & N. R. Co. v. United States (1915) 238 U. S. 1, 59 L. Ed. 1177, 35 S. Ct. 696; Louisville & N. R. Co. v. Railroad Commission of Kentucky (1915) 235 U. S. 601, 59 L. Ed. 379, 35 S. Ct. 146; The Los Angeles Switching Case (1914) 234 U. S. 294, 58 L. Ed. 1319, 34 S. Ct. 814; Florida East Coast R. Co. v. United States (1914) 234 U. S. 167, 58 L. Ed. 1267, 34 S. Ct. 867; *Interstate Commerce Commission v. Louisville & N. R. Co. (1913) 227 U. S. 88, 57 L. Ed. 431, 33 S. Ct. 185; *Interstate Commerce Commission v. Union Pac. R. Co. (1912) 222 U. S. 541, 56 L. Ed. 308, 32 S. Ct. 108; Interstate Commerce Commission v. Northern Pac. R. Co. (1910) 216 U. S. 538, 54 L. Ed. 608, 30 S. Ct. 417; Bodine & Clark Livestock Commission Co. v. Great Northern Ry. Co. (C. C. A. 9th, 1933) 63 F. (2d) 472, cert. den. 290 U. S. 629, 78 L. Ed. 548, 54 S. Ct. 48;

Willamette Iron & Steel Works v. Baltimore & O. R. Co. (C. C. A. 9th, 1928) 29 F. (2d) 80; Cape Fear Railways, Inc. v. United States (D. C. E. D. Va., Richmond Div., 1934) 7 F. Supp. 429, aff'd per curiam (1935) 294 U. S. 693, 79 L. Ed. 1232, 55 S. Ct. 403.

National Labor Relations Board.

National Labor Relations Board v. Bradford Dyeing Ass'n (1940) 310 U. S. 318, 84 L. Ed. 1226, 60 S. Ct. 918; National Licorice Co. v. National Labor Relations Board (1940) 309 U. S. 350, 84 L. Ed. 799, 60 S. Ct. 569; National Labor Relations Board v. Waterman S. S. Corp. (1940) 309 U. S. 206, 84 L. Ed. 704, 60 S. Ct. 493, rehearing denied 309 U. S. 696, 84 L. Ed. 1036, 60 S. Ct. 611; National Labor Relations Board v. Falk Corp. (1940) 308 U. S. 453, 84 L. Ed. 396, 60 S. Ct. 307; *Consolidated Edison Co. v. National Labor Relations Board (1938) 305 U. S. 197, 83 L. Ed. 126, 59 S. Ct. 206; Washington, Va. & Md. Coach Co. v. National Labor Relations Board (1937) 301 U. S. 142, 81 L. Ed. 965, 57 S. Ct. 648; National Labor Relations Board v. Asheville Hosiery Co. (C. C. A. 4th, 1939) 108 F. (2d) 288; Cupples Co. Manufacturers v. National Labor Relations Board (C. C. A. 8th, 1939) 106 F. (2d) 100; National Labor Relations Board v. Bell Oil & Gas Co. (C. C. A. 5th, 1938) 98 F. (2d) 870; Ballston-Stillwater Knitting Co. v. National Labor Relations Board (C. C. A. 2d, 1938) 98 F. (2d) 758; National Labor Relations Board v. Bell Oil & Gas Co. (C. C. A. 5th, 1938) 98 F. (2d) 406. See National Labor Relations Board v. Newport News Shipbuilding & Dry Dock Co. (1939) 308 U. S. 241, 84 L. Ed. 219, 60 S. Ct. 203.
Postmaster-General.

Leach v. Carlile (1922) 258 U. S. 138, 66 L. Ed. 511, 42 S. Ct. 227;

provide that administrative findings, if supported by evidence, shall

United States ex rel. Milwaukee Social Democratic Pub. Co. v. Burlington (1921) 255 U. S. 407, 65 L. Ed. 704, 41 S. Ct. 352; American School of Magnetic Healing v. McAnnulty (1902) 187 U. S. 94, 47 L. Ed. 90, 23 S. Ct. 33; Farley v. Heininger (1939) 70 App. D. C. 200, 105 F. (2d) 79, cert. den. 308 U. S. 587, 84 L. Ed. 491, 60 S. Ct. 110. See Central Trust Co. v. Central Trust Co. of Illinois (1910) 216 U. S. 251, 54 L. Ed. 469, 30 S. Ct. 341.

The President.

David L. Moss Co. v. United States (Ct. Cust. & Pat. App., 1939) 103 F. (2d) 395.

Secretary of Agriculture.

Tagg Bros. & Moorhead v. United States (1930) 280 U. S. 420, 74 L. Ed. 524, 50 S. Ct. 220; American Commission Co. v. United States (D. C. D. Colo., 1935) 11 F. Supp. 965; Union Stock Yards Co. of Omaha v. United States (D. C. D. Neb., Omaha Div., 1934) 9 F. Supp. 864; Barker-Miller Distributing Co. v. Berman (D. C. W. D. N. Y., 1934) 8 F. Supp. 60.

Secretary of the Interior.

Bailey v. Sanders (1913) 228 U. S. 603, 57 L. Ed. 985, 33 S. Ct. 602; *Whitecomb v. White (1909) 214 U. S. 15, 53 L. Ed. 889, 29 S. Ct. 599; Standard Oil Co. of California v. United States (C. C. A. 9th, 1940) 107 F. (2d) 402, cert. den. 309 U. S. 654, 84 L. Ed. 1003, 60 S. Ct. 469, rehearing denied 309 U. S. 697, 84 L. Ed. 1036, 60 S. Ct. 708.

State Agencies.

Ohio Utilities Co. v. Public Utilities Commission (1925) 267 U. S. 359, 69 L. Ed. 656, 45 S. Ct. 259; Keller v. Potomac Electric Co. (1923) 261 U. S. 428, 67 L. Ed. 731, 43 S. Ct. 445; *People ex rel. New York & Queens Gas Co. v. McCall (1917) 245 U. S. 345, 62 L. Ed. 337, 38 S. Ct.

122; Seaboard Air Line R. Co. v. Railroad Commission (1916) 240 U. S. 324, 60 L. Ed. 669, 36 S. Ct. 260; Washington ex rel. Oregon R. & N. Co. v. Fairchild (1912) 224 U. S. 510, 56 L. Ed. 863, 32 S. Ct. 535; New Hampshire Fire Ins. Co. v. Murray (C. C. A. 7th, 1939) 105 F. (2d) 212; Illinois Cent. R. Co. v. Vest (D. C. E. D. Ky., 1927) 39 F. (2d) 658. See Sterling v. Constantin (1932) 287 U. S. 378, 77 L. Ed. 375, 53 S. Ct. 190.

Tariff Commission.

*David L. Moss Co. v. United States (Ct. Cust. & Pat. App., 1939) 103 F. (2d) 395; In re Northern Pigment Co. (Ct. Cust. & Pat. App., 1934) 71 F. (2d) 447; Frischer & Co. v. Bakelite Corp. (Ct. Cust. & Pat. App., 1930) 39 F. (2d) 247, cert. den. 282 U. S. 852, 75 L. Ed. 755, 51 S. Ct. 29.

United States Maritime Commission.

Booth S. S. Co. v. United States (D. C. S. D. N. Y., 1939) 29 F. Supp. 221.

United States Shipping Board.

Swayne & Hoyt v. United States (1937) 300 U. S. 297, 81 L. Ed. 659, 57 S. Ct. 478; Isthmian S. S. Co. v. United States (D. C. S. D. N. Y., 1931) 53 F. (2d) 251.

Workmen's Compensation Cases.

South Chicago Coal & Dock Co. v. Bassett (1940) 309 U. S. 251, 84 L. Ed. 732, 60 S. Ct. 544; Del Vecchio v. Bowers (1935) 296 U. S. 280, 80 L. Ed. 229, 56 S. Ct. 190; Booth v. Monahan (D. C. D. Me., S. Div., 1930) 56 F. (2d) 168.

Quotations.

"Apart from cases involving constitutional rights to be appropriately enforced by proceedings in court, there can be no doubt that the Act contemplates that, as to questions of fact arising with respect to injuries to employees within the purview of the Act, the findings of the deputy commissioner, supported by evidence

be conclusive.³ An administrative order which is based upon a finding on an administrative question which is not supported by substantial evidence must be set aside as arbitrary⁴ and a denial of due

and within the scope of his authority, shall be final. To hold otherwise would be to defeat the obvious purpose of the legislation to furnish a prompt, continuous, expert and inexpensive method for dealing with a class of questions of fact which are peculiarly suited to examination and determination by an administrative agency specially assigned to that task." (Mr. Chief Justice Hughes in *Crowell v. Benson* (1932) 285 U. S. 22, 46, 76 L. Ed. 598, 52 S. Ct. 285.)

2 Alien Cases.

Lloyd Sabauda Societa Anonima v. Elting (1932) 287 U. S. 329, 77 L. Ed. 341, 53 S. Ct. 167.

Federal Communications Commission.

Rochester Telephone Corp. v. United States (1939) 307 U. S. 125, 83 L. Ed. 1147, 59 S. Ct. 754.

Federal Trade Commission.

Federal Trade Commission v. Artloom Corp. (C. C. A. 3d, 1934) 69 F. (2d) 36.

Interstate Commerce Commission.

United States v. Lowden (1939) 308 U. S. 225, 84 L. Ed. 208, 60 S. Ct. 248; *Youngstown Sheet & Tube Co. v. United States* (D. C. N. D. Ohio, E. Div., 1934) 7 F. Supp. 33, aff'd 295 U. S. 476, 79 L. Ed. 1553, 55 S. Ct. 822.

National Labor Relations Board.

* *Consolidated Edison Co. v. National Labor Relations Board* (1938) 305 U. S. 197, 83 L. Ed. 126, 59 S. Ct. 206; *Jefferson Electric Co. v. National Labor Relations Board* (C. C. A. 7th, 1939) 102 F. (2d) 949; *National Labor Relations Board v. Bell Oil & Gas Co.* (C. C. A. 5th, 1938) 98 F. (2d) 870.

³ See the statutes set forth in Appendix A, §§ 831-860.

4 Alien Cases.

United States ex rel. Vajtauer v. Commissioner of Immigration (1927) 273 U. S. 103, 71 L. Ed. 560, 47 S. Ct. 302; *Ex parte Chung Thet Poy* (D. C. D. Mass., 1926) 13 F. (2d) 262, aff'd (C. C. A. 1st, 1927) 16 F. (2d) 1018.

Interstate Commerce Commission.

The Chicago Junction Case (1924) 264 U. S. 258, 68 L. Ed. 667, 44 S. Ct. 317; *Louisville & N. R. Co. v. Finn* (1915) 235 U. S. 601, 59 L. Ed. 379, 35 S. Ct. 146; *Interstate Commerce Commission v. Louisville & N. R. Co.* (1913) 227 U. S. 88, 57 L. Ed. 431, 33 S. Ct. 185.

State Agencies.

Railroad Commission of California v. Pacific Gas & Electric Co. (1938) 302 U. S. 338, 82 L. Ed. 319, 58 S. Ct. 334; *Northern Pac. R. Co. v. Department of Public Works* (1925) 268 U. S. 39, 69 L. Ed. 837, 45 S. Ct. 412; *Ohio Utilities Co. v. Public Utilities Commission* (1925) 267 U. S. 359, 69 L. Ed. 656, 45 S. Ct. 259; *Louisville & N. R. Co. v. Finn* (1915) 235 U. S. 601, 59 L. Ed. 379, 35 S. Ct. 146.

Quotations.

"In cases arising under the Interstate Commerce Act, the provisions of which contemplate an investigation or inquiry conducted with some formality, followed by a written report and decision as the basis of the orders, it has been repeatedly held by this court that an administrative order made indisputably contrary to the evidence, or without any evidence, must be deemed to be arbitrary, and therefore subject to be set aside." (Mr. Justice Pitney in *Louisville & N. R. Co. v. Finn* (1915) 235 U. S. 601, 606, 59 L. Ed. 379, 35 S. Ct. 146.)

process.⁵ But a want of due process is not established merely by showing that the decision was erroneous.⁶

The requirement of substantial evidence is one of the elements of a valid delegation of legislative power to an agency under the Constitution.⁷

Where it does not appear that an administrative finding is unsupported by substantial evidence, the finding is presumed to be supported by such evidence.⁸ However, where a necessary finding has not been made, there can be no presumption that such substantial evidence as would be necessary to support it, exists.⁹

The substantial evidence rule applies despite the fact that the evidence adduced before the agency was conflicting,¹⁰ and it is the duty of the court to ascertain whether a finding is supported by substantial evidence, and, if so, give it effect without attempting a retrial,¹¹ even though, if the court had the power to weigh the evidence it would have made a different finding.¹² The fact that a plan to introduce

⁵ *Railroad Commission of California v. Pacific Gas & Electric Co.* (1938) 302 U. S. 388, 82 L. Ed. 319, 58 S. Ct. 334; *United States ex rel. Vajtauer v. Commissioner of Immigration* (1927) 273 U. S. 103, 71 L. Ed. 560, 47 S. Ct. 302.

⁶ *United States ex rel. Vajtauer v. Commissioner of Immigration* (1927) 273 U. S. 103, 71 L. Ed. 560, 47 S. Ct. 302.

⁷ *A. L. A. Schechter Poultry Corp. v. United States* (1935) 295 U. S. 495, 79 L. Ed. 1570, 55 S. Ct. 837, 97 A. L. R. 947. See also § 8 et seq.

⁸ See § 756.

⁹ *Wichita Railroad & Light Co. v. Public Utilities Commission* (1922) 260 U. S. 48, 67 L. Ed. 124, 43 S. Ct. 51.

¹⁰ *South Chicago Coal & Dock Co. v. Bassett* (1940) 309 U. S. 251, 84 L. Ed. 732, 60 S. Ct. 544; *Louisville & N. R. Co. v. United States* (1918) 245 U. S. 463, 62 L. Ed. 400, 38 S. Ct. 141; *Interstate Commerce Commission v. Louisville & N. R. Co.* (1913) 227 U. S. 88, 57 L. Ed. 431, 33 S. Ct. 185. See also § 516. This chapter should be read in connection with the

sections on administrative finality, § 509 et seq.

¹¹ *South Chicago Coal & Dock Co. v. Bassett* (1940) 309 U. S. 251, 84 L. Ed. 732, 60 S. Ct. 544.

¹² *Spiller v. Acheson, T. & S. F. R. Co.* (1920) 253 U. S. 117, 64 L. Ed. 810, 40 S. Ct. 466; *Oregon-Washington R. & Nav. Co. v. United States (D. C. D. Ore., 1931)* 47 F. (2d) 250.

"All of this is not to say that much of what has been related was uncontradicted and undenied by evidence offered by the Company and by the testimony of its officers. We have only delineated from this record of more than five hundred pages the basis of our conclusion that all of the Board's findings, far from resting on mere suspicion, are supported by evidence which is substantial. The Court of Appeals' failure to enforce the Board's order resulted from the substitution of its judgment on disputed facts for the Board's judgment,—and power to do that has been denied the courts by Congress. Whether the court would reach the same conclusion as the Board from the conflicting evidence is immaterial and the

further evidence was abandoned does not permit a court to treat an order as a nullity, if there is substantial evidence of the essential facts without such verification.¹³ If only part of the findings are unsupported by evidence, the request for an adverse ruling by a court should be directed to these. The court should not necessarily treat the order based upon all the findings as void *in toto*.¹⁴ Thus even if an agency bases its determination upon an erroneous rule of law, the determination will stand if the findings of fact, governed by the correct rule of law, are sufficient to sustain the determination and have substantial support in the evidence.¹⁵

The validity of findings must be decided upon the evidence introduced before the agency. Other evidence upon the issues presented is clearly inadmissible in court.¹⁶ The rule is applicable even though the findings, because of the expiration of the term of office of the agency's member who heard the testimony, have been made by his successor in office and are based only on a stenographic record of the testimony.¹⁷

The burden of showing that a finding is unsupported by substantial evidence is always upon the party making that claim.¹⁸

The fact that there is no substantial evidence to support an administrative finding may appear from the pleadings.¹⁹

Where an administrative agency is provided to review the determination of a lower administrative agency, it should sustain finding made by the agency below in the absence of proof sufficient to support a contrary finding.²⁰

court's disagreement with the Board could not warrant the disregard of the statutory division of authority set up by Congress." (Mr. Justice Black in *National Labor Relations Board v. Waterman S. S. Corp.* (1940) 309 U. S. 206, 226, 84 L. Ed. 704, 60 S. Ct. 493, rehearing denied 309 U. S. 696, 84 L. Ed. 1036, 60 S. Ct. 611.)

See also § 516.

¹³ *Spiller v. Atchison, T. & S. F. R. Co.* (1920) 253 U. S. 117, 64 L. Ed. 810, 40 S. Ct. 466.

¹⁴ *Spiller v. Atchison, T. & S. F. R. Co.* (1920) 253 U. S. 117, 64 L. Ed. 810, 40 S. Ct. 466.

¹⁵ *Helvering v. Rankin* (1935) 295 U. S. 123, 79 L. Ed. 1343, 55 S. Ct. 732.

¹⁶ *Louisville & N. R. Co. v. United States* (1918) 245 U. S. 463, 62 L. Ed. 400, 38 S. Ct. 141.

¹⁷ *Seaside Improvement Co. v. Commissioner of Internal Revenue* (C. C. A. 2d, 1939) 105 F. (2d) 990, cert. den. 308 U. S. 618, 84 L. Ed. 516, 60 S. Ct. 263.

¹⁸ See §§ 756, 764.

¹⁹ See § 730.

²⁰ *Commissioner of Internal Revenue v. Langwell Real Estate Corp.* (C. C. A. 7th, 1931) 47 F. (2d) 841.

§ 576. Rule Inapplicable Where All Evidence Not Set Forth in Administrative Record.

A showing that substantial evidence supports a finding can only be made by reference to evidence in the administrative record.²¹ Thus the substantial evidence rule cannot be applied to uphold a finding unless all the relevant evidence upon which the administrative agency made its determination is disclosed and set forth in the administrative record. That is, if the administrative record discloses only part of the evidence upon which the agency made its determination, the administrative findings are not binding upon the courts and are invalid, even if supported by substantial evidence in the record made.²² Where a statute provides for an administrative record this implies that all facts found and their sources shall be shown in the record and be open to challenge and opposing evidence.²³

§ 577. When Claim of Lack of Substantial Evidence May Not Be Made.

A contention that administrative findings are not supported by substantial evidence may not be made where all relevant portions of the evidence taken before the agency are not before the court.²⁴

²¹ See § 314 et seq., and § 586.

²² See *Ohio Bell Telephone Co. v. Public Utilities Commission* (1937) 301 U. S. 292, 81 L. Ed. 1093, 57 S. Ct. 724.

²³ *Crowell v. Benson* (1932) 285 U. S. 22, 76 L. Ed. 598, 52 S. Ct. 285. See also § 316.

²⁴ **Board of Tax Appeals.**

Robinson v. Commissioner of Internal Revenue (C. C. A. 9th, 1938) 97 F. (2d) 552; *Kendrick Coal & Dock Co. v. Commissioner of Internal Revenue* (C. C. A. 8th, 1928) 29 F. (2d) 559. See *Commissioner of Internal Revenue v. Continental Screen Co.* (C. C. A. 6th, 1931) 53 F. (2d) 210. *Interstate Commerce Commission.*

* *Mississippi Valley Barge Line Co. v. United States* (1934) 292 U. S. 282, 78 L. Ed. 1260, 54 S. Ct. 692; *United States v. Northern Pac. R. Co.*

(1933) 288 U. S. 490, 77 L. Ed. 914, 53 S. Ct. 406; *Chicago, I. & L. R. Co. v. United States* (1926) 270 U. S. 287, 70 L. Ed. 590, 46 S. Ct. 226; *Nashville, C. & St. L. R. Co. v. Tennessee* (1923) 262 U. S. 318, 67 L. Ed. 999, 43 S. Ct. 583; * *Louisiana & Pine Bluff R. Co. v. United States* (1921) 257 U. S. 114, 66 L. Ed. 156, 42 S. Ct. 25; *Spiller v. Atchison, T. & S. F. Ry. Co.* (1920) 253 U. S. 117, 64 L. Ed. 810, 40 S. Ct. 466; * *Hudson & M. R. Co. v. Hardy* (C. C. A. 2d, 1939) 103 F. (2d) 327, cert. den. 307 U. S. 640, 83 L. Ed. 1521, 59 S. Ct. 1038; *Department of Public Works v. United States* (D. C. W. D. Wash., S. Div., 1932) 55 F. (2d) 392; * *Atchison, T. & S. F. Ry. Co. v. United States* (1931) 51 F. (2d) 510, rev'd on other grounds 284 U. S. 248, 76 L. Ed. 273, 52 S. Ct. 146; *Philadelphia-Detroit Lines v.*

Where a case reaches the Supreme Court upon petition for certiorari, a party may not argue that administrative findings are not supported by substantial evidence if its petition for certiorari does not present that question.²⁵ Where, instead of the record of testimony before the Board of Tax Appeals, there was introduced before the reviewing court only a praecipe specifying certain verbatim extracts from the stenographer's report of that testimony, no record adequate for review of the Board's findings of facts is presented.²⁶ Where the attack is in effect a demurrer to the findings, and a claim, without traversing them, that they do not support the order, the findings must be accepted as conclusive, and the existence of substantial evidence presumed.²⁷

§ 578. Collateral Attack.

In a direct proceeding to annul or set aside an order to which the agency or the government creating it is a party, the plaintiffs are entitled to rely on the lack of substantial evidence to sustain a material finding, as a basis for attacking the order. The court will consider this objection on the evidence.²⁸ To prevail in a collateral attack upon an order in a suit in which the agency and the government are not parties, it has been held that those making the attack must, to prevail, show that the order was void on the face of the findings without regard to the evidence or the absence of it.²⁹ Thus in a suit by a railroad to prevent state authorities from penalizing it for com-

United States (D. C. S. D. Fla., Jacksonville Div., 1939) 31 F. Supp. 188, aff'd 308 U. S. 528, 84 L. Ed. 446, 60 S. Ct. 384, rehearing denied 309 U. S. 694, 84 L. Ed. 1035, 60 S. Ct. 513; *Visceglia v. United States* (D. C. S. D. N. Y., 1938) 24 F. Supp. 355; *Koppers Gas & Coke Co. v. United States* (D. C. D. Minn., 3d Div., 1935) 11 F. Supp. 467; *Cape Fear Railways, Inc. v. United States* (D. C. E. D. Va., Richmond Div., 1934) 7 F. Supp. 429, aff'd per curiam (1935) 294 U. S. 693, 79 L. Ed. 1232, 55 S. Ct. 403.

National Labor Relations Board.

National Labor Relations Board v. Newport News Shipbuilding & Dry Dock Co. (1939) 308 U. S. 241, 84 L. Ed. 219, 60 S. Ct. 203.

State Agencies.

Patterson v. Stanolind Oil & Gas Co. (1939) 305 U. S. 376, 83 L. Ed. 231, 59 S. Ct. 259.

²⁵ *Washington, Va. & Md. Coach Co. v. National Labor Relations Board* (1937) 301 U. S. 142, 81 L. Ed. 965, 57 S. Ct. 648.

²⁶ *Commissioner of Internal Revenue v. Continental Screen Co.* (C. C. A. 6th, 1931) 53 F. (2d) 210.

²⁷ *Federal Trade Commission v. Wallace* (C. C. A. 8th, 1935) 75 F. (2d) 733.

²⁸ *State of New York v. United States* (1922) 257 U. S. 591, 66 L. Ed. 385, 42 S. Ct. 239.

²⁹ *State of New York v. United States* (1922) 257 U. S. 591, 66 L. Ed. 385, 42 S. Ct. 239.

plying with an order of the Interstate Commerce Commission, to which suit the United States and the Commission are not parties, it has been held that the defense of the state authorities contesting the order's validity is a collateral attack upon the order, in which the question of the sufficiency of the evidence may not be determined.³⁰

A suit to enforce a reparation order does not involve collateral attack on the order in question, and lack of substantial evidence to support the agency's findings may be interposed as a defense in such a suit.³¹

§ 579. Admission of Incompetent Evidence Immaterial: Informal Proof.

Statutes setting up administrative schemes often provide that the rules of evidence prevailing in courts of law and equity shall not be controlling.³² Accordingly, if an administrative finding is supported by substantial evidence, the admission of matter which is incompetent irrelevant, or immaterial under the rules of evidence applicable to judicial proceedings does not affect its validity.³³

The inquiry of a board of the character of the Interstate Commerce Commission should not be too narrowly constrained by technical rules as to the admissibility of proof. Its function is largely one of investigation, and it should not be hampered by those narrow rules which prevail in trials at common law where a strict correspondence is required between allegation and proof. The Commission is an administrative body and, even where it acts in a quasi-judicial capacity, is not limited by the strict rules as to the admissibility of evidence which prevail in suits between private parties.³⁴ Thus,

³⁰ *State of New York v. United States* (1922) 257 U. S. 591, 66 L. Ed. 385, 42 S. Ct. 239.

³¹ *Willamette Iron & Steel Works v. Baltimore & O. R. Co.* (C. C. A. 9th, 1938) 29 F. (2d) 80.

³² E. g., the National Labor Relations Act, § 10 (b), 29 USCA 160 (b). See the statutes collected in Appendix A, §§ 831-860.

³³ *Alien Cases*.

United States ex rel. Bilokumsky v. Tod (1923) 263 U. S. 149, 68 L. Ed. 221, 44 S. Ct. 54.

Interstate Commerce Commission.

United States v. Abilene & S. R.

Co. (1924) 265 U. S. 274, 68 L. Ed. 1016, 44 S. Ct. 565; *Spiller v. Atchison, T. & S. F. Ry. Co.* (1920) 253 U. S. 117, 64 L. Ed. 810, 40 S. Ct. 466.

National Labor Relations Board.

National Labor Relations Board v. Bell Oil & Gas Co. (C. C. A. 5th, 1938) 98 F. (2d) 870.

State Agencies.

Northern Pac. R. Co. v. Department of Public Works (1925) 268 U. S. 39, 69 L. Ed. 837, 45 S. Ct. 412.

³⁴ *Spiller v. Atchison, T. & S. F. Ry. Co.* (1920) 253 U. S. 117, 64 L. Ed. 810, 40 S. Ct. 466.

where claims have been assigned to a party before the commission, he offers to file all the assignments, and a copy of one is inserted in the stenographer's notes, there is substantial evidence to support the finding that the claims were assigned. There is no need, in so summary a proceeding, for formal proof of the handwriting of the assignors, in the absence of objection or contradiction.³⁵

Whatever the effect of seasonable objection may be, evidence not objected to as hearsay when introduced, or at any time during the hearing before the agency, is, as in a court, to be considered and accorded its natural probative effect, as if it were in law admissible. Where it is so introduced and substantially corroborated by original evidence clearly admissible against the parties to be affected, an agency is not to be regarded as having acted arbitrarily, nor may its findings and order be rejected as wanting in support, simply because hearsay evidence was considered with the rest.³⁶ When hearsay evidence is admitted, and accepted very much as the testimony of an expert witness might have been accepted, whether the witness has shown such special knowledge as to qualify him to testify as an expert is for the agency to determine; and its decision thereon is not to be set aside by the courts unless clearly shown to have been unfounded.³⁷

§ 580. — Absence of Testimony by Some Parties Not a Defect.

The absence of testimony by some of the parties affected is not a defect. Where the finding is amply sustained by the evidence it is unimportant that only five of a great number of affected parties had witnesses at a hearing. The commission may quite properly give consideration to these five. In considering whether the record supports the findings the court gives no consideration to the number of witnesses, or the weight to be given the testimony of any.³⁸

§ 581. State Cases: Application of Rule by State Court Final.

Where a state court decides that a state agency's finding is supported by substantial evidence, a mere allegation of denial of due

³⁵ *Spiller v. Atchison, T. & S. F. Ry. Co.* (1920) 253 U. S. 117, 64 L. Ry. Co. (1920) 253 U. S. 117, 64 L. Ed. 810, 40 S. Ct. 466.

³⁶ *Spiller v. Atchison, T. & S. F. Ry. Co.* (1920) 253 U. S. 117, 64 L. Ed. 810, 40 S. Ct. 466.

³⁸ *Youngstown Sheet & Tube Co. v. United States* (D. C. N. D. Ohio, E. Div., 1934) 7 F. Supp. 33, aff'd 295 U. S. 476, 79 L. Ed. 1553, 55 S. Ct. 822.

³⁷ *Spiller v. Atchison, T. & S. F.*

process, without a claim of confiscation or other further constitutional objection, presents no federal question.³⁹

§ 582. Rule Does Not Apply to Judicial Questions Including Mixed Questions of Law and Fact.

The substantial evidence rule has no application whatever to administrative decisions of constitutional or other judicial questions,⁴⁰ including mixed questions of law and fact.⁴¹

§ 583. Substantial Evidence—Other Phrases.

Statutes requiring that an agency's order be based upon "evidence,"⁴² or providing that the agency's finding upon the facts, if supported by "evidence," shall be conclusive⁴³ mean substantial evidence.⁴⁴ The statement in a statute that evidence in an administrative proceeding to overcome the effect of a presumption must be substantial adds nothing to the well understood principle that a finding must be supported by evidence.⁴⁵

The following phrases have been used as the equivalent of the

³⁹ Bell Telephone Co. v. Pennsylvania Public Utility Commission (1940) 309 U. S. 30, 84 L. Ed. 563, 60 S. Ct. 411.

⁴⁰ See Frischer & Co., Inc. v. Bakelite Corp. (Ct. Cust. & Pat. App., 1930) 39 F. (2d) 247, cert. den. 282 U. S. 852, 75 L. Ed. 755, 51 S. Ct. 29. See also §§ 262, 424 et seq.

⁴¹ Board of Tax Appeals.

Helvering v. Rankin (1935) 295 U. S. 123, 79 L. Ed. 1343, 55 S. Ct. 732; Farish v. Commissioner of Internal Revenue (C. C. A. 5th, 1939) 103 F. (2d) 63; Hoag v. Commissioner of Internal Revenue (C. C. A. 10th, 1938) 101 F. (2d) 948; Helvering v. Elkhorn Coal Co. (C. C. A. 4th, 1937) 95 F. (2d) 732, cert. den. 305 U. S. 605, 83 L. Ed. 384, 59 S. Ct. 65. Interstate Commerce Commission.

United States v. Idaho (1936) 298 U. S. 105, 80 L. Ed. 1070, 56 S. Ct. 690.

Secretary of the Interior.

United States v. Corporation of the President of the Church of Jesus Christ of Latter-Day Saints (C. C. A. 10th, 1939) 101 F. (2d) 156. See, however, Whitecomb v. White (1909) 214 U. S. 15, 53 L. Ed. 889, 29 S. Ct. 599.

⁴² Vernon's Ann. Civ. St. Texas, Art. 6008, §§ 11, 12.

⁴³ E. g., the National Labor Relations Act, 29 USCA 160(e).

⁴⁴ National Labor Relations Board v. Waterman S. S. Corp. (1940) 309 U. S. 206, 84 L. Ed. 704, 60 S. Ct. 493, rehearing denied 309 U. S. 696, 84 L. Ed. 1036, 60 S. Ct. 611; * Consolidated Edison Co. v. National Labor Relations Board (1938) 305 U. S. 197, 83 L. Ed. 126, 59 S. Ct. 206.

⁴⁵ Del Vecchio v. Bowers (1935) 296 U. S. 280, 80 L. Ed. 229, 56 S. Ct. 190.

standard phrase "substantial evidence": "evidence,"⁴⁶ "adequate" evidence or proof,⁴⁷ "adequate basis for the court's finding,"⁴⁸ "ample" evidence or support in the evidence,⁴⁹ that a conclusion is "amply justified by the record,"⁵⁰ "any evidence,"⁵¹ "competent

46 Alien Cases.

Kessler v. Streecker (1939) 307 U. S. 22, 83 L. Ed. 1082, 59 S. Ct. 694.

Interstate Commerce Commission.

Standard Oil Co. v. United States (1931) 283 U. S. 235, 75 L. Ed. 999, 51 S. Ct. 429; Chicago, R. I. & P. R. Co. v. United States (1927) 274 U. S. 29, 71 L. Ed. 911, 47 S. Ct. 486.

National Labor Relations Board.

Consolidated Edison Co. v. National Labor Relations Board (1938) 305 U. S. 197, 83 L. Ed. 126, 59 S. Ct. 206; National Labor Relations Board v. Fruehauf Trailer Co. (1937) 301 U. S. 49, 81 L. Ed. 918, 57 S. Ct. 642, 108 A. L. R. 1352; National Labor Relations Board v. Jones & Laughlin Steel Corp. (1937) 301 U. S. 1, 81 L. Ed. 893, 57 S. Ct. 615, 108 A. L. R. 1352.

State Agencies.

Bell Telephone Co. v. Pennsylvania Public Utility Commission (1940) 309 U. S. 30, 84 L. Ed. 563, 60 S. Ct. 411.

Veterans' Administration.

Del Vecchio v. Bowers (1935) 296 U. S. 280, 80 L. Ed. 229, 56 S. Ct. 190.

Workmen's Compensation Cases.

South Chicago Coal & Dock Co. v. Bassett (1940) 309 U. S. 251, 84 L. Ed. 732, 60 S. Ct. 544.

47 Interstate Commerce Commission.

United States v. Northern Pac. R. Co. (1933) 288 U. S. 490, 77 L. Ed. 914, 53 S. Ct. 406; Manufacturers R. Co. v. United States (1918) 246 U. S. 457, 62 L. Ed. 831, 38 S. Ct. 383.

The President.

A. L. A. Schechter Poultry Corp. v. United States (1935) 295 U. S. 495, 79 L. Ed. 1570, 55 S. Ct. 837, 97 A. L. R. 947.

State Agencies.

United Gas Public Service Co. v. Texas (1938) 303 U. S. 123, 82 L. Ed. 702, 58 S. Ct. 483, rehearing denied 303 U. S. 667, 82 L. Ed. 1124, 58 S. Ct. 483; Public Service Commission v. Havemeyer (1936) 296 U. S. 506, 80 L. Ed. 357, 56 S. Ct. 360, rehearing denied 297 U. S. 727, 80 L. Ed. 1010, 56 S. Ct. 496.

48 Eichholz v. Public Service Commission (1939) 306 U. S. 268, 275, 83 L. Ed. 641, 59 S. Ct. 532, rehearing denied 306 U. S. 609, 83 L. Ed. 1063, 59 S. Ct. —.

49 Interstate Commerce Commission.

The Assigned Car Cases (1927) 274 U. S. 564, 71 L. Ed. 1204, 47 S. Ct. 727; Western Paper Makers' Chemical Co. v. United States (1926) 271 U. S. 268, 70 L. Ed. 941, 46 S. Ct. 500; Colorado v. United States (1926) 271 U. S. 153, 70 L. Ed. 878, 46 S. Ct. 452; United States v. Illinois Cent. R. Co. (1924) 263 U. S. 515, 68 L. Ed. 417, 44 S. Ct. 189; The New England Divisions Case (1923) 261 U. S. 184, 67 L. Ed. 605, 43 S. Ct. 270.

Secretary of Agriculture.

Tagg Bros. & Moorhead v. United States (1930) 280 U. S. 420, 74 L. Ed. 524, 50 S. Ct. 220.

50 United States ex rel. Milwaukee Social Democratic Pub. Co. v. Burleson (1921) 255 U. S. 407, 65 L. Ed. 704, 41 S. Ct. 352 (Postmaster-General).

51 United States ex rel. Vajtauer v. Commissioner of Immigration (1927) 273 U. S. 103, 71 L. Ed. 560, 47 S. Ct. 302.

evidence,"⁵² "enough evidence,"⁵³ "pertinent evidence,"⁵⁴ "some evidence,"⁵⁵ "substantial support in the evidence,"⁵⁶ "sufficient evidence,"⁵⁷ "ground for holding,"⁵⁸ that the record "is not wholly barren of evidence,"⁵⁹ "reasonable support in the record,"⁶⁰ "sufficient basis for the . . . determination,"⁶¹ and "testimony."⁶²

§ 584. Extent of Court's Right to Search for Presence of Substantial Evidence.

Whether there is substantial evidence to support an administrative finding, that is, the legal effect of evidence, is a question of law.⁶³

⁵² *Western Paper Makers' Chemical Co. v. United States* (D. C. W. D. Mich., S. Div., 1925) 7 F. (2d) 164, aff'd 271 U. S. 268, 70 L. Ed. 941, 46 S. Ct. 500.

⁵³ *South Chicago Coal & Dock Co. v. Bassett* (1940) 309 U. S. 251, 84 L. Ed. 732, 60 S. Ct. 544 (Compensation); *Claiborne-Annapolis Ferry Co. v. United States* (1932) 285 U. S. 382, 76 L. Ed. 808, 52 S. Ct. 440.

⁵⁴ *New York Central Securities Corp. v. United States* (1932) 287 U. S. 12, 77 L. Ed. 138, 53 S. Ct. 45; *Inland Steel Co. v. United States* (D. C. N. D. Ill., E. Div., 1938) 23 F. Supp. 291, aff'd 306 U. S. 153, 83 L. Ed. 557, 59 S. Ct. 415.

⁵⁵ *United States ex rel. Vajtauer v. Commissioner of Immigration* (1927) 273 U. S. 103, 71 L. Ed. 560, 47 S. Ct. 302.

⁵⁶ *Board of Tax Appeals.*

Helvering v. Rankin (1935) 295 U. S. 123, 79 L. Ed. 1343, 55 S. Ct. 732. *Interstate Commerce Commission.*

Chicago, R. I. & P. R. Co. v. United States (1927) 274 U. S. 29, 71 L. Ed. 911, 47 S. Ct. 486.

National Labor Relations Board.

National Labor Relations Board v. Waterman S. S. Corp. (1940) 309 U. S. 206, 84 L. Ed. 704, 60 S. Ct. 493, rehearing denied 309 U. S. 696, 84 L. Ed. 1036, 60 S. Ct. 611; *National Labor Relations Board v. Newport News Shipbuilding & Dry Dock Co.* (1939) 308 U. S. 241, 84 L. Ed. 219, 60 S. Ct. 203; *National Labor Rela-*

tions Board v. Fansteel Metallurgical Corp. (1939) 306 U. S. 240, 83 L. Ed. 627, 59 S. Ct. 490, 123 A. L. R. 599.

⁵⁷ *United States v. American Sheet & Tin Plate Co.* (1937) 301 U. S. 402, 409, 81 L. Ed. 1186, 57 S. Ct. 804; *Claiborne-Annapolis Ferry Co. v. United States* (1932) 285 U. S. 382, 76 L. Ed. 808, 52 S. Ct. 440.

⁵⁸ *Lloyd Sabauo Societa Anonima v. Elting* (1932) 287 U. S. 329, 77 L. Ed. 341, 53 S. Ct. 167.

⁵⁹ *Consolidated Edison Co. v. National Labor Relations Board* (1938) 305 U. S. 197, 83 L. Ed. 126, 59 S. Ct. 206.

⁶⁰ *United States ex rel. Milwaukee Social Democratic Pub. Co. v. Burleson* (1921) 255 U. S. 407, 65 L. Ed. 704, 41 S. Ct. 352.

⁶¹ *Illinois Commerce Commission v. United States* (1934) 292 U. S. 474, 78 L. Ed. 1371, 54 S. Ct. 783.

⁶² *Federal Trade Commission v. Standard Education Society* (1937) 302 U. S. 112, 82 L. Ed. 141, 58 S. Ct. 113, rehearing denied 302 U. S. 779, 82 L. Ed. 602, 58 S. Ct. 365; *Federal Trade Commission v. Algoma Lumber Co.* (1934) 291 U. S. 67, 78 L. Ed. 655, 54 S. Ct. 315; *Oregon-Washington R. & Nav. Co. v. United States* (D. C. D. Ore., 1931) 47 F. (2d) 250, aff'd 288 U. S. 14, 77 L. Ed. 588, 53 S. Ct. 266.

⁶³ *Interstate Commerce Commission v. Louisville & N. R. Co.* (1913) 227 U. S. 88, 57 L. Ed. 431, 33 S. Ct. 185.

Hence the court may examine the evidence to ascertain whether the agency's findings are supported by substantial evidence.⁶⁴ It may examine to see whether the evidence was sufficiently broad in scope,⁶⁵ whether it tends to prove the point in support of which it is offered,⁶⁶ or is otherwise sufficiently specific to support findings having particular application in individual cases, though general in form and nature,⁶⁷ and above all, whether it rationally supports the findings

⁶⁴ See § 586.

Board of Tax Appeals.

Washburn v. Commissioner of Internal Revenue (C. C. A. 8th, 1931) 51 F. (2d) 949.

Court of Claims.

United States v. Clark (1878) 96 U. S. 37, 24 L. Ed. 696.

Federal Trade Commission.

International Shoe Co. v. Federal Trade Commission (1930) 280 U. S. 291, 74 L. Ed. 431, 50 S. Ct. 89; Federal Trade Commission v. Curtis Pub. Co. (1923) 260 U. S. 568, 67 L. Ed. 408, 43 S. Ct. 210.

Interstate Commerce Commission.

Florida v. United States (1931) 282 U. S. 194, 75 L. Ed. 291, 51 S. Ct. 119; Baltimore & O. R. Co. v. United States (1928) 277 U. S. 291, 72 L. Ed. 885, 48 S. Ct. 520; The Assigned Car Cases (1927) 274 U. S. 564, 71 L. Ed. 1204, 47 S. Ct. 727; Northern Pac. R. Co. v. Department of Public Works (1925) 268 U. S. 39, 69 L. Ed. 837, 45 S. Ct. 412; Florida East Coast R. Co. v. United States (1914) 234 U. S. 167, 58 L. Ed. 1267, 34 S. Ct. 867; *Interstate Commerce Commission v. Louisville & N. R. Co. (1913) 227 U. S. 88, 57 L. Ed. 431, 33 S. Ct. 185; Chicago & E. I. Ry. Co. v. United States (D. C. N. D. Ill., E. Div., 1930) 43 F. (2d) 987.

National Labor Relations Board.

Consolidated Edison Co. v. National Labor Relations Board (1938) 305 U. S. 197, 83 L. Ed. 126, 59 S. Ct. 206.

State Agencies.

Illinois Cent. R. Co. v. Vest (D. C. E. D. Ky., 1927) 39 F. (2d) 658.

Quotations.

"And an inquiry into the facts before the Commission, in order to ascertain whether its findings are thus vitiated, belongs to the judicial province and does not trench upon, or involve the exercise of, administrative authority. Such an examination is not concerned with the weight of evidence or with the wisdom or expediency of the administrative action." (Mr. Chief Justice Hughes in Federal Radio Commission v. Nelson Bros. Bond & Mfg. Co. (1933) 289 U. S. 266, 277, 77 L. Ed. 1166, 53 S. Ct. 627, 89 A. L. R. 406.)

Miscellaneous.

The cases cited are only those which support the statement with some degree of articulation. Obviously every opinion which makes an examination of the evidence in an administrative record, follows the rule.

⁶⁵ Baltimore & O. R. Co. v. United States (D. C. N. J., 1930) 43 F. (2d) 603, aff'd 284 U. S. 195, 76 L. Ed. 243, 52 S. Ct. 109.

⁶⁶ Baltimore & O. R. Co. v. United States (1928) 277 U. S. 291, 72 L. Ed. 885, 48 S. Ct. 520.

⁶⁷ The Assigned Car Cases (1927) 274 U. S. 564, 71 L. Ed. 1204, 47 S. Ct. 727; Northern Pac. R. Co. v. Department of Public Works (1925) 268 U. S. 39, 69 L. Ed. 837, 45 S. Ct. 412.

when contrary evidence which may be considered weightier in effect is disregarded.⁶⁸

§ 585. — Special Extension of This Power in Federal Trade Commission Cases.

In Federal Trade Commission cases, the court is empowered by statute to make and enter upon the pleadings, testimony, and proceedings, a decree affirming, modifying or setting aside the Commission's order.⁶⁹ This power of review is broader in scope than the court's power respecting the Interstate Commerce Commission.⁷⁰ This enlarges its power to look into the evidence before the agency so that it may ascertain for itself the issues presented and whether there are material facts not reported by the Commission.⁷¹ If this inspection shows substantial evidence relating to facts from which different conclusions reasonably may be drawn, the matter will ordinarily be remanded to the commission for additional findings,⁷² although the court may decide the controversy without remand.⁷³ The ultimate determination of what constitutes an unfair method of competition is for the court, not the commission. It is a judicial question.⁷⁴

§ 586. What Constitutes Substantial Evidence.

Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to

68 Federal Trade Commission.

International Shoe Co. v. Federal Trade Commission (1930) 280 U. S. 291, 74 L. Ed. 431, 50 S. Ct. 89; *Federal Trade Commission v. Curtis Pub. Co.* (1923) 260 U. S. 568, 67 L. Ed. 408, 43 S. Ct. 210.

Interstate Commerce Commission.

Florida East Coast R. Co. v. United States (1914) 234 U. S. 167, 58 L. Ed. 1267, 34 S. Ct. 867; *Illinois Cent. R. Co. v. Vest* (D. C. E. D. Ky., 1927) 39 F. (2d) 658. See *Florida v. United States* (1931) 282 U. S. 194, 75 L. Ed. 291, 51 S. Ct. 119.

⁶⁹ *Federal Trade Commission v. Curtis Pub. Co.* (1923) 260 U. S. 568, 67 L. Ed. 408, 43 S. Ct. 210.

⁷⁰ *International Shoe Co. v. Federal Trade Commission* (1930) 280 U. S.

291, 74 L. Ed. 431, 50 S. Ct. 89; ** Federal Trade Commission v. Curtis Pub. Co.* (1923) 260 U. S. 568, 67 L. Ed. 408, 43 S. Ct. 210.

⁷¹ *Federal Trade Commission v. Curtis Pub. Co.* (1923) 260 U. S. 568, 67 L. Ed. 408, 43 S. Ct. 210.

⁷² *International Shoe Co. v. Federal Trade Commission* (1930) 280 U. S. 291, 74 L. Ed. 431, 50 S. Ct. 89; ** Federal Trade Commission v. Curtis Pub. Co.* (1923) 260 U. S. 568, 67 L. Ed. 408, 43 S. Ct. 210.

⁷³ ** Federal Trade Commission v. Curtis Pub. Co.* (1923) 260 U. S. 568, 67 L. Ed. 408, 43 S. Ct. 210.

⁷⁴ *Federal Trade Commission v. Curtis Pub. Co.* (1923) 260 U. S. 568, 67 L. Ed. 408, 43 S. Ct. 210. See also § 463.

support a conclusion;⁷⁵ evidence furnishing a substantial basis of fact from which the fact in issue can reasonably be inferred.⁷⁶ This

⁷⁵ *Consolidated Edison Co. v. National Labor Relations Board (1938) 305 U. S. 197, 83 L. Ed. 126, 59 S. Ct. 206; National Labor Relations Board v. Columbian Enameling & Stamping Co. (1939) 306 U. S. 292, 83 L. Ed. 660, 59 S. Ct. 501; Interstate Commerce Commission v. Union Pac. R. Co. (1912) 222 U. S. 541, 56 L. Ed. 508, 32 S. Ct. 108.

For an example of substantial evidence, see *Spiller v. Atchison, T. & S. F. R. Co.* (1920) 253 U. S. 117, 64 L. Ed. 810, 40 S. Ct. 466.

The rule with respect to a jury verdict in judicial proceedings is substantially the same. *Gunning v. Cooley* (1930) 281 U. S. 90, 74 L. Ed. 720, 50 S. Ct. 231.

*"Third. The sufficiency of the evidence to sustain the findings of the Board with respect to coercive practices, discrimination and discharge of employees.—*The companies contend that the Court of Appeals misconceived its power to review the findings and, instead of searching the record to see if they were sustained by 'substantial' evidence, merely considered whether the record was 'wholly barren of evidence' to support them. We agree that the statute, in providing that 'the findings of the Board as to the facts, if supported by evidence, shall be conclusive,' means supported by substantial evidence. *Washington, V. & M. Coach Co. v. National Labor Relations Board*, 301 U. S. 142, 147. Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Appalachian Electric Power Co. v. National Labor Relations Board*, 93 F. 2d 985, 989; *National Labor Relations Board v. Thompson Products*,

97 F. 2d 13, 15; *Ballston-Stillwater Co. v. National Labor Relations Board*, 98 F. 2d 758, 760. We do not think that the Court of Appeals intended to apply a different test. In saying that the record was not 'wholly barren of evidence' to sustain the finding of discrimination, we think that the court referred to substantial evidence. *Ballston-Stillwater Co. v. National Labor Relations Board*, supra.

"The companies urge that the Board received 'remote hearsay' and 'mere rumor.' The statute provides that 'the rules of evidence prevailing in courts of law and equity shall not be controlling.' The obvious purpose of this and similar provisions is to free administrative boards from the compulsion of technical rules so that the mere admission of matter which would be deemed incompetent in judicial proceedings would not invalidate the administrative order. *Interstate Commerce Comm'n v. Baird*, 194 U. S. 25, 44; *Interstate Commerce Comm'n v. Louisville & Nashville R. Co.*, 227 U. S. 88, 93; *United States v. Abilene & Southern Ry. Co.*, 265 U. S. 274, 288; *Tagg Bros. & Moorhead v. United States*, 280 U. S. 420, 442. But this assurance of a desirable flexibility in administrative procedure does not go so far as to justify orders without a basis in evidence having rational probative force. Mere uncorroborated hearsay or rumor does not constitute substantial evidence." (Mr. Chief Justice Hughes in *Consolidated Edison Co. v. National Labor Relations Board* (1938) 305 U. S. 197, 229, 230, 83 L. Ed. 126, 59 S. Ct. 206.)

⁷⁶ *National Labor Relations Board v. A. S. Abell Co. (C. C. A. 4th, 1938)* 97 F. (2d) 951; *Appalachian Electric*

ordinarily means evidence which is competent, relevant, and material.⁷⁷ Substantial evidence may not consist of mere uncorroborated hearsay or rumor,⁷⁸ other incompetent evidence,⁷⁹ or evidence which merely creates suspicion or gives equal support to inconsistent inferences.⁸⁰ But substantial evidence includes all conduct which forms a basis for inference,⁸¹ and is not confined strictly to matter regarded as competent in judicial proceedings.⁸²

§ 587. — Evidence Taken in Investigatory Proceeding.

Data collected by an agency solely in the exercise of its function of investigation⁸³ constitute ordinarily evidence sufficient to support an order, if the data are duly made part of the record in the case in which the order is entered,⁸⁴ and full right of cross-examination is afforded,⁸⁵ but if not so introduced, the data cannot be treated as evidence in an adversary proceeding. A proceeding is adversary, although instituted by the agency, if it may result in an order in favor of one party subject to regulation as against another.⁸⁶ Inquests and inquisitions, if expressly authorized, are, at common law, admissible in evidence in judicial proceedings, thus constituting an exception to both the hearsay rule and the rule against opinion evidence.⁸⁷ Some

Power Co. v. National Labor Relations Board (C. C. A. 4th, 1938) 93 F. (2d) 985.

⁷⁷ * National Labor Relations Board v. Bell Oil & Gas Co. (C. C. A. 5th, 1938) 98 F. (2d) 870; National Labor Relations Board v. Bell Oil & Gas Co. (C. C. A. 5th, 1938) 98 F. (2d) 406.

⁷⁸ * Consolidated Edison Co. v. National Labor Relations Board (1938) 305 U. S. 197, 83 L. Ed. 126, 59 S. Ct. 206; Tri-State Broadcasting Co. v. Federal Communications Commission (1938) 68 App. D. C. 292, 96 F. (2d) 564. See National Labor Relations Board v. Remington Rand, Inc. (C. C. A. 2d, 1938) 94 F. (2d) 862.

⁷⁹ Tri-State Broadcasting Co. v. Federal Communications Commission (1938) 68 App. D. C. 292, 96 F. (2d) 564.

⁸⁰ Appalachian Electric Power Co. v. National Labor Relations Board (C. C. A. 4th, 1938) 93 F. (2d) 985.

⁸¹ United States ex rel. Vajtauer v.

Commissioner of Immigration (1927) 273 U. S. 103, 71 L. Ed. 560, 47 S. Ct. 302; United States ex rel. Bilokumsky v. Tod (1923) 263 U. S. 149, 68 L. Ed. 221, 44 S. Ct. 54.

⁸² United States v. Abilene & S. R. Co. (1924) 265 U. S. 274, 68 L. Ed. 1016, 44 S. Ct. 565; United States ex rel. Bilokumsky v. Tod (1923) 263 U. S. 149, 68 L. Ed. 221, 44 S. Ct. 54; Spiller v. Atchison, T. & S. F. R. Co. (1920) 253 U. S. 117, 64 L. Ed. 810, 40 S. Ct. 466.

⁸³ See § 57 et seq.

⁸⁴ United States v. Los Angeles & S. L. R. Co. (1927) 273 U. S. 299, 71 L. Ed. 651, 47 S. Ct. 413.

⁸⁵ See § 304.

⁸⁶ United States v. Abilene & S. R. Co. (1924) 265 U. S. 274, 68 L. Ed. 1016, 44 S. Ct. 565. See also § 314 et seq.

⁸⁷ United States v. Los Angeles & S. L. R. Co. (1927) 273 U. S. 299, 71 L. Ed. 651, 47 S. Ct. 413.

inquests are at common law *prima facie* evidence of the facts found,⁸⁸ as are final valuations of the Interstate Commerce Commission under the Valuation Act.⁸⁹ In the latter instance Congress has provided an adequate administrative remedy for the correction of errors in the final valuation and the classification thereof.⁹⁰

§ 588. — Interrogation of Prisoner in Alien Cases.

An interrogation under oath by federal officials of one lawfully confined to a state prison, made, in the absence of counsel, without informing the prisoner of his right to refuse to answer and to have counsel, may be introduced in evidence in a deportation proceeding where the prisoner refuses to answer at the proceeding.⁹¹ Such an examination is not an illegal search and seizure,⁹² and its introduction does not render a hearing unfair since a deportation proceeding is civil in its nature.⁹³ In a civil case there is no presumption of citizenship comparable to the presumption of innocence, no privilege to refuse to testify, no rule against drawing an adverse inference from standing mute, nor any rule against involuntary confessions.⁹⁴ Voluntary statements made by an alien to an immigration inspector while alien was in custody but before arrest are *a fortiori* admissible.⁹⁵

§ 589. — Silence May Be Evidence.

Conduct which forms a basis for inference is evidence, and silence is often evidence of the most persuasive character.⁹⁶ But this is true only where there is a legal duty to give evidence. No inference may

⁸⁸ United States v. Los Angeles & S. L. R. Co. (1927) 273 U. S. 299, 71 L. Ed. 651, 47 S. Ct. 413.

⁸⁹ 49 USCA 19a. United States v. Los Angeles & S. L. R. Co. (1927) 273 U. S. 299, 71 L. Ed. 651, 47 S. Ct. 413.

⁹⁰ United States v. Los Angeles & S. L. R. Co. (1927) 273 U. S. 299, 71 L. Ed. 651, 47 S. Ct. 413.

⁹¹ United States ex rel. Bilokumsky v. Tod (1923) 263 U. S. 149, 68 L. Ed. 221, 44 S. Ct. 54.

⁹² United States ex rel. Bilokumsky v. Tod (1923) 263 U. S. 149, 68 L. Ed. 221, 44 S. Ct. 54.

⁹³ United States ex rel. Bilokumsky

v. Tod (1923) 263 U. S. 149, 68 L. Ed. 221, 44 S. Ct. 54.

⁹⁴ United States ex rel. Bilokumsky v. Tod (1923) 263 U. S. 149, 68 L. Ed. 221, 44 S. Ct. 54.

⁹⁵ Chan Nom Gee v. United States (C. C. A. 9th, 1932) 57 F. (2d) 646.

⁹⁶ United States ex rel. Vajtauer v. Commissioner of Immigration (1927) 273 U. S. 103, 71 L. Ed. 560, 47 S. Ct. 302; United States ex rel. Bilokumsky v. Tod (1923) 263 U. S. 149, 68 L. Ed. 221, 44 S. Ct. 54; Chan Nom Gee v. United States (C. C. A. 9th, 1932) 57 F. (2d) 646; Saksagansky v. Weedon (C. C. A. 9th, 1931) 53 F. (2d) 13.

be drawn from silence where there is no duty to speak.⁹⁷ The weight to be given to silence which is evidence, like the weight to be given all evidence, is for the tribunal conducting the trial.⁹⁸

§ 590. — Typical Evidence.

Administrative agencies may reason from the particular to the general.⁹⁹ When an investigation involves shipments to and from many places under varying conditions, typical instances justify general findings. To require specific evidence and separate adjudication in respect to each of hundreds of instances would be tantamount to denying the possibility of granting relief.¹ And evidence of individual rates or divisions, said to be typical of all, affords a basis for a finding as to any one.² Congress may, consistently with the due process clause, create rebuttable presumptions and shift the burden of proof. It might therefore have declared in terms that when the Interstate Commerce Commission finds that evidence introduced is typical of operating conditions and of joint rates and divisions of the carriers of a group, it may be accepted as *prima facie* evidence bearing upon the proper divisions of each joint rate of every carrier in that group. Congress did so provide, in effect, when it imposed upon the Commission the duty of determining divisions, for only in that way could the task be done.³ In such a case over six hundred carriers and millions of different rates would be involved, and the need to be met urgent. To require specific evidence and separate adjudication with respect to each division of each rate of each carrier would be tantamount to denying the possibility of granting relief.⁴ In such case serious injustice to any carrier can be avoided by its availing itself of the saving clause which allows anyone to exempt

⁹⁷ United States ex rel. Vajtauer v. Commissioner of Immigration (1927) 273 U. S. 103, 71 L. Ed. 560, 47 S. Ct. 302.

⁹⁸ United States ex rel. Vajtauer v. Commissioner of Immigration (1927) 273 U. S. 103, 71 L. Ed. 560, 47 S. Ct. 302.

⁹⁹ The Assigned Car Cases (1927) 274 U. S. 564, 71 L. Ed. 1204, 47 S. Ct. 727.

¹ Georgia Public Service Commission v. United States (1931) 283 U. S. 765, 75 L. Ed. 1397, 51 S. Ct. 619; Railroad Commission v. Chicago, B.

& Q. R. Co. (1923) 257 U. S. 563, 66 L. Ed. 371, 42 S. Ct. 232, 22 A. L. R. 1086.

² United States v. Abilene & S. R. Co. (1924) 265 U. S. 274, 68 L. Ed. 1016, 44 S. Ct. 565; The New England Divisions Case (1923) 261 U. S. 184, 67 L. Ed. 605, 43 S. Ct. 270.

³ The New England Divisions Case (1923) 261 U. S. 184, 67 L. Ed. 605, 43 S. Ct. 270.

⁴ The New England Divisions Case (1923) 261 U. S. 184, 67 L. Ed. 605, 43 S. Ct. 270.

himself from the order, in whole or in part, on proper showing.⁵ But such a clause cannot make valid an order so broad as to include all rates of any description when it is clear that this would include many rates not within the proper class or the reason of the order.⁶ And evidence of traffic in the aggregate, while it should properly be taken into consideration by the commission, is not a substitute for typical evidence as to individual joint rates and divisions. Such substitution is beyond the commission's power. Averages are apt to be misleading.⁷ Similarly, it is not necessary to take testimony from every party affected.⁸

§ 591. — In Rate Cases.

§ 592. — Evidence as to One Part of Through Rate Competent as to Another Part and as to the Through Rate.

In a hearing before the Interstate Commerce Commission, testimony of the reasonableness of "specifics" (proportionals) for part of a through rate is competent on the issue of the reasonableness of "specifics" for other parts as to which there is no testimony, where there is testimony tending to show that the latter, on the basis of the former, are reasonable.⁹ Such testimony is also competent on the issue of the reasonableness of the through rate.¹⁰

§ 593. — Relevance of Net Income Upon Issue of Reasonableness.

It is clearly unsound to say that the net operating profit accruing from a whole rate structure is not relevant evidence in determining whether the sum of the rates is fair.¹¹ But where the reasonableness of one rate or class of rates is an issue, the total operating profit of

⁵ The New England Divisions Case (1923) 261 U. S. 184, 67 L. Ed. 605, 43 S. Ct. 270; Railroad Commission v. Chicago, B. & Q. R. Co. (1922) 257 U. S. 563, 66 L. Ed. 371, 42 S. Ct. 232, 22 A. L. R. 1086.

⁶ Railroad Commission v. Chicago, B. & Q. R. Co. (1922) 257 U. S. 563, 66 L. Ed. 371, 42 S. Ct. 232, 22 A. L. R. 1086.

⁷ United States v. Abilene & S. R. Co. (1924) 265 U. S. 274, 68 L. Ed. 1016, 44 S. Ct. 565.

⁸ Youngstown Sheet & Tube Co. v. United States (D. C. N. D. Ohio, E. Div., 1934) 7 F. Supp. 33, aff'd 295

U. S. 476, 79 L. Ed. 1553, 56 S. Ct. 822.

⁹ Western Paper Makers' Chemical Co. v. United States (D. C. W. D. Mich., S. Div., 1925) 7 F. (2d) 164, aff'd 271 U. S. 268, 70 L. Ed. 941, 46 S. Ct. 500.

¹⁰ Western Paper Makers' Chemical Co. v. United States (D. C. W. D. Mich., S. Div., 1925) 7 F. (2d) 164, aff'd 271 U. S. 268, 70 L. Ed. 941, 46 S. Ct. 500.

¹¹ Dayton-Goose Creek R. Co. v. United States (1924) 263 U. S. 456, 68 L. Ed. 388, 44 S. Ct. 169, 33 A. L. R. 472.

the railroad or public utility is of little use in reaching a conclusion.¹² Where the issue is the reasonableness of state rates, evidence to show that the revenue of a carrier from both state and interstate commerce gives a fair profit is not relevant.¹³

§ 594. Risks from Refusal to Present Evidence.

Where a party to an administrative proceeding withdraws from a hearing, refusing to present evidence or cross-examine opposing witnesses, it has little, if any, ground to claim that an ensuing determination of an administrative question is not supported by substantial evidence. Such a procedure invites an adverse determination of all administrative questions present, and the risk run is obvious.¹⁴

A decision on an administrative question may not be assailed in court on the ground that it was based upon the hostile attitude of the agency toward the complainant or a group which includes him, where he does not take advantage of his opportunity before the agency to present evidence to refute that offered in support of the position ultimately adopted by the decision.¹⁵

§ 595. When Findings Prima Facie Evidence Only: Statutory Provisions.

Some statutes, instead of providing that administrative findings on administrative questions shall be conclusive if supported by substantial evidence, provide that the findings shall be only *prima facie* evidence of the facts,¹⁶ and allow for the taking of additional evidence by the reviewing court.¹⁷

¹² Dayton-Goose Creek R. Co. v. United States (1924) 263 U. S. 456, 68 L. Ed. 388, 44 S. Ct. 169, 33 A. L. R. 472.

¹³ Dayton-Goose Creek R. Co. v. United States (1924) 263 U. S. 456, 68 L. Ed. 388, 44 S. Ct. 169, 33 A. L. R. 472.

¹⁴ Associated Press v. National Labor Relations Board (1937) 301 U. S. 103, 81 L. Ed. 953, 57 S. Ct. 650.

¹⁵ National Labor Relations Board v. Jones & Laughlin Steel Corp. (1937) 301 U. S. 1, 81 L. Ed. 893, 57 S. Ct. 615, 108 A. L. R. 1352.

¹⁶ Findings of the Secretary of Agriculture under the Grain Standards Act, 7 USCA 78.

Findings of the Interstate Com-

merce Commission underlying reparation orders, in a civil suit for damages under section 16 (2) of the Interstate Commerce Act, "shall be prima facie evidence of the facts therein stated." See Meeker v. Lehigh Valley R. Co. (1915) 236 U. S. 412, 59 L. Ed. 644, 35 S. Ct. 328; Penn Anthracite Mining Co. v. Delaware & H. R. Corp. (D. C. M. D. Pa., 1936) 16 F. Supp. 732, aff'd (C. C. A. 3d, 1937) 91 F. (2d) 634, cert. den. (1938) 302 U. S. 756, 82 L. Ed. 585, 58 S. Ct. 283. 49 USCA 16 (2).

¹⁷ Findings of the Secretary of Commerce underlying an order to cease and desist from monopolistic practices in the fishing industry, 15 USCA 522.

CHAPTER 35

NECESSITY THAT DETERMINATION BE NOT OTHERWISE ARBITRARY

- § 596. Introduction.
- § 597. Arbitrary Administrative Action in General.
- § 598. —Arbitrary Decision of Judicial Question.
- § 599. Arbitrary Classification.
- § 600. Prescribed Forms of Account.
- § 601. —Must Be Consistent with Good Morals.
- § 602. —Difficulty of Accounting in Forms Prescribed.
- § 603. Failure to Follow Controlling Judicial Decision.
- § 604. Order So Vague as to Be Arbitrary.
- § 605. Reliance on Biased Employees of Agency.
- § 606. Arbitrariness Occasioned by Elapse of Time and Change in Conditions.

§ 596. Introduction.

To be valid, an administrative determination of an administrative question must be plainly ascertainable through ultimate and basic findings,¹ and such findings must be supported by substantial evidence.² There is a further requisite, not altogether logically separable from the foregoing rules, to the effect that the determination must not be otherwise arbitrary. That is the subject of this chapter.

§ 597. Arbitrary Administrative Action in General.

When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power.³ The due process clause

¹ See §§ 550, 564 et seq.

² See § 575 et seq.

³ "When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power. Sovereignty itself is, of course, not subject to law,

for it is the author and source of law; but in our system, while sovereign powers are delegated to the agencies of government, sovereignty itself remains with the people, by whom and for whom all government exists and acts. And the law is the definition and limitation of power. It is, indeed, quite true, that there must always be lodged somewhere, and in some person or body, the authority of final decision; and in many

condemns all arbitrary action, and there is no place in our constitutional system for the exercise of arbitrary power.⁴ Action palpably arbitrary is an abuse of power and will be enjoined.⁵ Hence there is a general substantial requirement that, to be valid, an administrative determination of an administrative question must not be arbitrary.⁶

The doctrine of administrative finality does not apply to arbitrary determinations of administrative questions.⁷ Thus a court will con-

cases of mere administration the responsibility is purely political, no appeal lying except to the ultimate tribunal of the public judgment, exercised either in the pressure of opinion or by means of the suffrage. But the fundamental rights to life, liberty, and the pursuit of happiness, considered as individual possessions, are secured by those maxims of constitutional law which are the monuments showing the victorious progress of the race in securing to men the blessings of civilization under the reign of just and equal laws, so that, in the famous language of the Massachusetts Bill of Rights, the government of the commonwealth 'may be a government of laws and not of men.' For, the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself." (Mr. Justice Matthews in *Yick Wo v. Hopkins* (1886) 118 U. S. 356, 369, 370, 30 L. Ed. 220, 6 S. Ct. 1064.)

⁴*Jones v. Securities & Exchange Commission* (1936) 298 U. S. 1, 80 L. Ed. 1015, 56 S. Ct. 654. See *Pacific States Box & Basket Co. v. White* (1935) 296 U. S. 176, 80 L. Ed. 138, 56 S. Ct. 159, 101 A. L. R. 853.

⁵*Myles Salt Co. v. Board of Com'rs of Iberia & St. Mary Drainage Dist.* (1916) 239 U. S. 478, 60 L. Ed. 392, 36 S. Ct. 204.

⁶ Alien Cases.

White v. Chin Fong (1920) 253 U. S. 90, 64 L. Ed. 797, 40 S. Ct. 449; *United States ex rel. Coria v. Commissioner of Immigration* (D. C. S. D. N. Y., 1938) 25 F. Supp. 569. See *United States ex rel. Tisi v. Tod* (1924) 264 U. S. 131, 68 L. Ed. 590, 44 S. Ct. 260.

Federal Communications Commission.

See *American Telephone & Telegraph Co. v. United States* (1936) 299 U. S. 232, 81 L. Ed. 142, 57 S. Ct. 170.

Interstate Commerce Commission.

Louisiana & Pine Bluff R. Co. v. United States (1921) 257 U. S. 114, 66 L. Ed. 156, 42 S. Ct. 25; *Kansas City Southern R. Co. v. Interstate Commerce Commission* (1913) 231 U. S. 423, 58 L. Ed. 296, 34 S. Ct. 125.

State Agencies.

Pacific States Box & Basket Co. v. White (1935) 296 U. S. 176, 80 L. Ed. 138, 56 S. Ct. 159, 101 A. L. R. 853; *West v. Chesapeake & Potomac Telephone Co.* (1935) 295 U. S. 662, 79 L. Ed. 1640, 55 S. Ct. 894; *Miller v. Standard Nut Margarine Co.* (1932) 284 U. S. 498, 76 L. Ed. 422, 52 S. Ct. 260; *Myles Salt Co. v. Board of Com'rs of Iberia & St. Mary Drainage Dist.* (1916) 239 U. S. 478, 60 L. Ed. 392, 36 S. Ct. 204; **Yick Wo v. Hopkins* (1886) 118 U. S. 356, 30 L. Ed. 220, 6 S. Ct. 1064.

⁷*West v. Chesapeake & Potomac Telephone Co.* (1935) 295 U. S. 662, 79 L. Ed. 1640, 55 S. Ct. 894; *United States ex rel. Coria v. Commissioner*

sider an allegation that an order is arbitrary and so unreasonable that it should be set aside although there is no claim that it is confiscatory, or that there was lack of notice or opportunity to be heard before the agency, or that the proceedings were otherwise irregular, or that the order was unsupported by evidence.⁸

An administrative determination clearly contrary to the evidence, or wholly unwarranted by it, is arbitrary and itself a denial of due process.⁹

The requirement that administrative action be not arbitrary is really only a summary, in general terms, of the specific requirements of the due process and equal protection clauses detailed by the cases, to which a large part of this work is devoted.

§ 598. — Arbitrary Decision of Judicial Question.

A fortiori an administrative decision of a judicial question must not be arbitrary. Thus, where a commissioner of immigration ignores the question presented to him and the evidence pertaining to it, reviews and reverses the judgment of another time and tribunal, and takes away the right exercised under it—a right upon which the person involved is entitled to a judicial inquiry and decision, the commissioner's order is void.¹⁰

§ 599. Arbitrary Classification.

Administrative agencies are often empowered to make classifications of various subjects. These are the substantial equivalent of statutory classification, and when made by an agency constitute the determination of administrative questions within the legislative sphere.¹¹ In general a classification set up by administrative order is subject to the same constitutional requirements as a classification set up by statute. An additional feature is the question of fact of determining whether an arbitrary classification has been set up by the effect of an administrative order independent of the face of the statute.¹²

§ 600. Prescribed Forms of Account.

The Interstate Commerce Commission in 1913,¹³ and later the Federal Communications Commission,¹⁴ were given power by Con-

of Immigration (D. C. S. D. N. Y., 1938) 25 F. Supp. 569.

⁸ Louisiana & Pine Bluff R. Co. v. United States (1921) 257 U. S. 114, 66 L. Ed. 156, 42 S. Ct. 25.

⁹ See § 575.

¹⁰ White v. Chin Fong (1920) 253 U. S. 90, 64 L. Ed. 797, 40 S. Ct. 449.

¹¹ See § 401 et seq.

¹² See § 401 et seq.

¹³ 49 USCA 20 (5).

¹⁴ 47 USCA 220.

gress to prescribe the forms of account to be used by certain utilities. The determination of a proper form of account is in substance the determination of an administrative question on which the judgment of a court may not be substituted for that of the agency.¹⁵ The exercise of the legislative discretion thus confided to an administrative agency is final so long as the agency does not exceed the bounds of legislative discretion.¹⁶ Here administrative powers are not exceeded if the prescribed system of accounts appears to be unwise or burdensome or inferior to another system. Error or unwisdom is not equivalent to abuse, and the prescribed system must appear to be so entirely at odds with fundamental principles of correct account as to be the expression of whim rather than an exercise of judgment, in order to fall under the constitutional condemnation of arbitrary action.¹⁷ Nor is a prescribed accounting practice arbitrary if it fails to direct that a particular item should be charged in a particular way or under a particular account. It is enough that such items may find lodgement somewhere with an appropriate entry betokening their meaning even though this be awkward or imperfect.¹⁸ In disposing of matters such as depreciation or amortization the label is unimportant if the substance of allowance is adequately preserved.¹⁹ Nor can an agency be criticized for failure to supply instructions for depreciation or amortization where the property in question has not been ascertained.²⁰

In gauging the rationality or arbitrary character of an order prescribing uniform forms of accounts, regard must be had to the ends that a uniform system of accounts is intended to promote, which is to facilitate, not regulation, but proper furnishing of information to the agency.²¹

¹⁵ American Telephone & Telegraph Co. v. United States (1936) 299 U. S. 232, 81 L. Ed. 142, 57 S. Ct. 170. See also §§ 525, 537, 542.

¹⁶ See § 68.

¹⁷ American Telephone & Telegraph Co. v. United States (1936) 299 U. S. 232, 81 L. Ed. 142, 57 S. Ct. 170 (FCC); Kansas City Southern R. Co. v. United States (1913) 231 U. S. 423, 58 L. Ed. 296, 34 S. Ct. 125; Chesapeake & O. Ry. Co. v. United States (D. C. E. D. Va., 1933) 5 F. Supp. 7 (ICC).

¹⁸ American Telephone & Telegraph Co. v. United States (1936) 299 U. S. 232, 81 L. Ed. 142, 57 S. Ct. 170.

¹⁹ American Telephone & Telegraph Co. v. United States (1936) 299 U. S. 232, 81 L. Ed. 142, 57 S. Ct. 170.

²⁰ American Telephone & Telegraph Co. v. United States (1936) 299 U. S. 232, 81 L. Ed. 142, 57 S. Ct. 170.

²¹ American Telephone & Telegraph Co. v. United States (1936) 299 U. S. 232, 81 L. Ed. 142, 57 S. Ct. 170.

§ 601. — Must Be Consistent with Good Morals.

An administrative agency may not set up an arbitrary standard of behavior or classification. A standard of behavior or classification is not arbitrary where it is consistent with good morals.²² Thus where pursuant to statutory authority to require the establishment of particular practices, such as an accounting practice, a standard of behavior is prescribed which is consistent with good morals, it cannot be assailed as arbitrary even though it causes a taking of a party's property.²³ And a prescribed accounting practice requiring disclosure of all charges paid to an affiliated corporation in excess of just and reasonable charges, is not arbitrary since it is consistent with good morals.²⁴ Arbitrary accounting classifications are not created by requiring that property be accounted for as "used in present service,"²⁵ or "held for imminent use."²⁶

§ 602. — Difficulty of Accounting in Forms Prescribed.

If the difficulties of accounting in a form prescribed should be found to be insuperable, means will be at hand whereby an avenue of escape from injustice will be opened without resort to the drastic remedy of declaring the administrative order void.²⁷ Whether or not the difficulty of accounting in the form prescribed, as in the making of estimates required, is so great as to drag nullity in its train is apparently a matter of degree.²⁸ The burden of proof is on the complaining party to show that the difficulty or expense involved lays so heavy a burden upon him as to overpass the bounds of reason.²⁹

²² American Telephone & Telegraph Co. v. United States (1936) 299 U. S. 232, 81 L. Ed. 142, 57 S. Ct. 170.

²³ American Telephone & Telegraph Co. v. United States (1936) 299 U. S. 232, 81 L. Ed. 142, 57 S. Ct. 170.

²⁴ American Telephone & Telegraph Co. v. United States (1936) 299 U. S. 232, 81 L. Ed. 142, 57 S. Ct. 170.

²⁵ American Telephone & Telegraph Co. v. United States (1936) 299 U. S. 232, 81 L. Ed. 142, 57 S. Ct. 170.

²⁶ American Telephone & Telegraph Co. v. United States (1936) 299 U. S. 232, 81 L. Ed. 142, 57 S. Ct. 170.

²⁷ American Telephone & Telegraph Co. v. United States (1936) 299 U. S. 232, 81 L. Ed. 142, 57 S. Ct. 170.

²⁸ American Telephone & Telegraph Co. v. United States (1936) 299 U. S. 232, 81 L. Ed. 142, 57 S. Ct. 170.

²⁹ American Telephone & Telegraph Co. v. United States (1936) 299 U. S. 232, 81 L. Ed. 142, 57 S. Ct. 170.

§ 603. Failure to Follow Controlling Judicial Decision.

When, either in a case involving the same party, or one which, though against a different party, is indistinguishable on the facts, the court has rejected an agency's venture at decision of a judicial question, it is arbitrary and capricious for the agency to re-apply the rejected decision.³⁰ Thus when in two cases federal courts had decided that the tax on oleomargarine did not fall on butter substitutes made from nuts, further application by the Collector of Internal Revenue of the tax to a butter substitute was enjoined as arbitrary and capricious.³¹

§ 604. Order So Vague as to Be Arbitrary.

Administrative orders should be definite and clear, their terms being so drawn as to preclude misapprehension.³² An order which sets up an indefinite standard of conduct is invalid.³³ A contention that an order is arbitrary because so vague as to make compliance very difficult or impossible will be rejected where the agency's rules provide for clarifying instructions whenever duty is uncertain.³⁴ A carefully drawn order, otherwise valid and practicable of application over a wide territory, will not be set aside on judicial review because of possible uncertainty in isolated instances. The appropriate remedy in such circumstances is to make an application to the agency requesting it to suspend the operation of the order so far as it may affect the isolated cases, and, if necessary, to enter an independent order dealing specifically with them. Such an order would be independently reviewable in court without disturbing the first order.³⁵

§ 605. Reliance on Biased Employees of Agency.

It may be arbitrary for an administrative agency to rely upon its own employees who are biased.³⁶ But an agency's employees are not

³⁰ *Miller v. Standard Nut Margarine Co.* (1932) 284 U. S. 498, 76 L. Ed. 422, 52 S. Ct. 260.

³¹ *Miller v. Standard Nut Margarine Co.* (1932) 284 U. S. 498, 76 L. Ed. 422, 52 S. Ct. 260.

³² See *American Express Co. v. South Dakota ex rel. Caldwell* (1917) 244 U. S. 617, 61 L. Ed. 1352, 37 S. Ct. 656.

³³ *Swift & Co. v. Wallace* (C. C. A. 7th, 1939) 105 F. (2d) 848; *Southern Pac. Co. v. Railroad Commission* (D.

C. N. D. Cal., S. Div., 1935) 10 F. Supp. 918.

³⁴ *American Telephone & Telegraph Co. v. United States* (1936) 299 U. S. 232, 81 L. Ed. 142, 57 S. Ct. 170.

³⁵ *Georgia Public Service Commission v. United States* (1931) 283 U. S. 765, 75 L. Ed. 1397, 51 S. Ct. 619.

³⁶ See *Champlin Refining Co. v. Corporation Commission* (1932) 286 U. S. 210, 76 L. Ed. 1062, 52 S. Ct. 559, 86 A. L. R. 403.

biased merely because their salaries and expenses are paid by interested parties, in the absence of proof of actual bias. There is no right to have an agency's orders set at naught and the purposes of the Act thwarted merely because in the absence of legislative appropriations therefor, the salaries and expenses of agents or employees were paid out of a fund raised by parties interested in having such orders issued.³⁷ That the commission's order was in fact arbitrary must be proven. It cannot merely be inferred from possible bias of its investigators.³⁸

§ 606. Arbitrariness Occasioned by Elapse of Time and Change in Conditions.

It is well settled that past orders and findings of fact of administrative agencies are not *res judicata*.³⁹ Hence an administrative order of continuing effect, valid when made, may become arbitrary at a later time due to changed economic conditions.⁴⁰ Percentages of proration of oil production, valid at one time, may be inapplicable, unjust and arbitrary at another.⁴¹ A party's failure to prove that an administrative order is arbitrary at a particular time is no bar to an appropriate action to invalidate the order at a different time on a different set of facts.⁴² The court is concerned only with present findings and conclusions upon the current evidence.⁴³

³⁷ Champlin Refining Co. v. Corporation Commission (1932) 286 U. S. 210, 76 L. Ed. 1062, 52 S. Ct. 559, 86 A. L. R. 403.

³⁸ Champlin Refining Co. v. Corporation Commission (1932) 286 U. S. 210, 76 L. Ed. 1062, 52 S. Ct. 559, 86 A. L. R. 403. See United States ex rel. Goldman v. Tod (D. C. N. D. N. Y., 1924) 3 F. (2d) 836.

³⁹ See § 255 et seq.

⁴⁰ Champlin Refining Co. v. Corporation Commission (1932) 286 U. S. 210, 76 L. Ed. 1062, 52 S. Ct. 559, 86

A. L. R. 403. See also § 318 et seq.

⁴¹ Champlin Refining Co. v. Corporation Commission (1932) 286 U. S. 210, 76 L. Ed. 1062, 52 S. Ct. 559, 86 A. L. R. 403.

⁴² Champlin Refining Co. v. Corporation Commission (1932) 286 U. S. 210, 76 L. Ed. 1062, 52 S. Ct. 559, 86 A. L. R. 403.

⁴³ Youngstown Sheet & Tube Co. v. United States (D. C. N. D. Ohio, E. Div., 1934) 7 F. Supp. 33, aff'd 295 U. S. 476, 79 L. Ed. 1553, 55 S. Ct. 822. See also § 262 et seq.

SUBDIVISION VII

JUDICIAL REVIEW OF ADMINISTRATIVE SUBPOENAS AND OF OTHER ADMINISTRATIVE DIRECTIONS TO FURNISH INFORMATION

CHAPTER 36

IN GENERAL

- § 607. A Case or Controversy: Judicial Review.
- § 608. Validity of Administrative Subpoenas.
- § 609. —Grounds for Issuance of Subpoena.
- § 610. —Reasonableness.
- § 611. —Privilege.
- § 612. Jurisdiction and Venue.
- § 613. Contempt.

§ 607. A Case or Controversy: Judicial Review.

The inquiry whether a witness before an administrative agency is bound to answer a particular question propounded to him, or to produce books, papers, etc., in his possession and called for by that body, is one that cannot be committed to an administrative agency for final determination.¹ The issue presented is not one of fact, but of law ex-

¹ "The inquiry whether a witness before the Commission is bound to answer a particular question propounded to him, or to produce books, papers, etc., in his possession and called for by that body, is one that cannot be committed to a subordinate administrative or executive tribunal for final determination. Such a body could not, under our system of government, and consistently with due process of law, be invested with authority to compel obedience to its orders by a judgment of fine or imprisonment. Except in the particular instances enumerated in the Constitution, and considered in *Anderson v.*

Dunn, 6 Wheat. 204, and in *Kilbourn v. Thompson*, 103 U. S. 168, 190, of the exercise by either house of Congress of its right to punish disorderly behavior upon the part of its members, and to compel the attendance of witnesses, and the production of papers in election and impeachment cases, and in cases that may involve the existence of those bodies, the power to impose fine or imprisonment in order to compel the performance of a legal duty imposed by the United States, can only be exerted, under the law of the land, by a competent judicial tribunal having jurisdiction in the premises." (Mr. Justice Harlan

provided by statute.⁷ But a suit may be maintained to enjoin an agency from enforcing subpoenas requiring the production of records, where it is alleged that irreparable injury would be sustained by a disclosure of information contained therein.⁸ Review of administrative subpoenas may also be had by appropriate suit against the person to whom the subpoena is directed to restrain him from producing the information sought.⁹ These are primarily questions of equity jurisdiction.

§ 608. Validity of Administrative Subpoenas.

§ 609. — Grounds for Issuance of Subpoena.

Ordinarily administrative subpoenas are sought in connection with the issues in a pending administrative proceeding. But a different

797g, 825f (b), (e); the Natural Gas Act, 15 USCA 717m (d).

Federal Trade Commission.

The Federal Trade Commission Act, 15 USCA 49.

Interstate Commerce Commission.

49 USCA 12 (3).

Investigation Commission.

The Railroad Retirement Act, 45 USCA 228j (b) 4.

Marine Casualty Investigation Board.

46 USCA 239 (c).

National Labor Relations Board.

The National Labor Relations Act, 29 USCA 161 (2).

Patent Office.

35 USCA 54-56.

Register of the Land Office.

Compare 43 USCA 104.

Secretary of Agriculture.

The Commodity Exchange Act, 7 USCA 15; the Packers and Stockyards Act, 7 USCA 222; the Perishable Agricultural Commodities Act, 7 USCA 499m (e); the Tobacco Inspection Act, 7 USCA 511n.

Secretary of Labor.

The Public Contracts Act, 41 USCA 39.

Secretary of War.

33 USCA 506.

Securities and Exchange Commission.

The Securities Act of 1933, 15 USCA 77v (b); the Securities Exchange Act of 1934, 15 USCA 78u (c); the Public Utility Holding Company Act, 15 USCA 79r (d); the Investment Company Act of 1940, 15 USCA 80a-41 (c); the Investment Advisers Act of 1940, 15 USCA 80b-9 (e).

Social Security Board.

The Social Security Act, 42 USCA 405 (e).

Tariff Commission.

19 USCA 1333 (b).

United States Maritime Commission.

The Merchant Marine Act of 1936, 46 USCA 1124.

Workmen's Compensation Cases.

The Longshoremen's and Harbor Workers' Act, 33 USCA 927.

⁷ Federal Trade Commission v. Millers' National Federation (1931) 60 App. D. C. 66, 47 F. (2d) 428.

⁸ Bank of America Nat. Trust & Savings Ass'n v. Douglas (1939) 70 App. D. C. 221, 105 F. (2d) 100, 123 A. L. R. 1266 (SEC).

⁹ McMann v. Securities & Exchange Commission (C. C. A. 2d, 1937) 87 F. (2d) 377, 109 A. L. R. 1445; cert. den. 301 U. S. 684, 81 L. Ed. 1342, 57 S. Ct. 785.

question arises where no separate proceeding has been instituted. An administrative subpoena may be issued even though no separate administrative proceeding is pending, where a showing is made that the agency has information affording reasonable ground to believe that a violation of the act has taken place.¹⁰ But an administrative subpoena will not be enforced unless it is made to appear that the agency has reasonable grounds to believe that the recipient of its subpoena is engaged in activities which the agency is authorized to supervise.¹¹ For instance, a court would not enforce an administrative subpoena issued by the Securities and Exchange Commission demanding that a corner grocer produce books and documents, merely on the allegation that he is engaged in a business which comes within the provisions of the Securities Act of 1933 and that he has violated the terms of the Act. The commission must show facts indicating that it has reasonable grounds to believe that the person charged is engaged in transactions which come within the purview of the statute.¹²

§ 610. — Reasonableness.

The conduct of administrative investigations under statutory authority is subject to the same testimonial privileges as judicial proceedings.¹³ An administrative subpoena may thus be so onerous as to constitute an unreasonable search under the Fourth Amendment, that is, one which is out of proportion to the end sought.¹⁴ A witness is not entitled to resist a subpoena for mere incompetency or irrelevancy. In order that the question of admissibility may enter

¹⁰ Consolidated Mines v. Securities & Exchange Commission (C. C. A. 9th, 1938) 97 F. (2d) 704.

¹¹ Securities & Exchange Commission v. Tung Corp. (D. C. N. D. Ill., E. Div., 1940) 32 F. Supp. 371.

¹² Securities & Exchange Commission v. Tung Corp. (D. C. N. D. Ill., E. Div., 1940) 32 F. Supp. 371.

¹³ See McMann v. Securities & Exchange Commission (C. C. A. 2d, 1937) 87 F. (2d) 377, 109 A. L. R. 1445; cert. den. 301 U. S. 684, 81 L. Ed. 1342, 57 S. Ct. 785.

¹⁴ Board of Tax Appeals.

United States v. Union Trust Co. of Pittsburgh (D. C. W. D. Pa., 1936) 13 F. Supp. 286.

Federal Trade Commission.

* Federal Trade Commission v. American Tobacco Co. (1924) 264 U. S. 298, 68 L. Ed. 696, 44 S. Ct. 336.

National Labor Relations Board.

National Labor Relations Board v. New England Transp. Co. (D. C. D. Conn., 1936) 14 F. Supp. 497.

Securities and Exchange Commission.

Bank of America Nat. Trust & Savings Ass'n v. Douglas (1939) 70 App. D. C. 221, 105 F. (2d) 100, 123 A. L. R. 1266; McMann v. Securities & Exchange Commission (C. C. A. 2d, 1937) 87 F. (2d) 377, 109 A. L. R. 1445, cert. den. 301 U. S. 684, 81 L. Ed. 1342, 57 S. Ct. 785.

the scales at all the papers demanded must be so manifestly irrelevant as to make it plain that the subpoena is but a step in a fishing expedition and thus an unreasonable search.¹⁵ A subpoena of the National Labor Relations Board, calling for a list of the company's entire personnel, which will assist the Board in classifying the employees, is not too broad although in some of the names the Board may have only an indirect interest.¹⁶ Where the Commissioner of Internal Revenue contended that asserted sales of stock by a taxpayer to a trust company were only colorable and were made with intent to defraud the government, a paragraph of a subpoena duces tecum demanding the production of the trust company's minutes for two years without further specification, was held unenforceable as violating the company's constitutional right against unreasonable search.¹⁷

§ 611. — Privilege.

The testimonial privileges which apply to judicial proceedings govern administrative investigations also, and may be waived in administrative as in judicial proceedings.¹⁸ Thus, where it is claimed that matter contained in documents ordered to be produced before an administrative agency on its subpoena duces tecum will incriminate an individual, the question whether there is incriminatory matter in the documents may be presented and judicially decided in a proceeding to enforce the subpoena.¹⁹ If a party considers that answering questions while testifying in an administrative proceeding violates his constitutional rights, it is incumbent on him at the time to assert his privilege.²⁰ Communications between a stockbroker and his customer are not among such privileged and protected communications.²¹ The statutory prohibition of publication, by Collectors of Internal

¹⁵ Federal Trade Commission v. Coal Corp. (D. C. E. D. Ky., 1938) 24 American Tobacco Co. (1924) 264 U. S. 298, 68 L. Ed. 696, 44 S. Ct. 336; F. Supp. 50.

¹⁶ National Labor Relations Board v. New England Transp. Co. (D. C. D. Conn., 1936) 14 F. Supp. 497. ¹⁹ In re Verser-Clay Co. (C. C. A. 10th, 1938) 98 F. (2d) 859, 120 A. L. R. 1098, cert. den. (1939) 306 U. S. 639, 83 L. Ed. 1040, 59 S. Ct. 487.

¹⁷ United States v. Union Trust Co. (D. C. W. D. Pa., 1936) 13 F. Supp. 286. ²⁰ Securities & Exchange Commission v. Torr (D. C. S. D. N. Y., 1936) 15 F. Supp. 144.

¹⁸ United States v. Shaw (D. C. S. D. Cal., Cent. Div., 1940) 33 F. Supp. 531; United States v. Mary Helen ²¹ McMann v. Securities & Exchange Commission (C. C. A. 2d, 1937) 87 F. (2d) 377, 109 A. L. R. 1445, cert. den. 301 U. S. 684, 81 L. Ed. 1342, 57 S. Ct. 785.

Revenue, of information gained in the course of their duties, does not render unenforceable a subpoena of the Board of Tax Appeals requiring the Commissioner of Internal Revenue to furnish information contained in tax returns, relevant to the issues before the Board.²²

§ 612. Jurisdiction and Venue.

Statutes giving administrative agencies power to issue subpoenas to persons anywhere in the United States for hearings anywhere in the country, enforceable in any federal district court, have been construed to mean a court of competent jurisdiction, that is, one with jurisdiction over the person summoned. This is ordinarily the court for the district where he resides.²³

§ 613. Contempt.

Administrative agencies have no power to punish for contempt for failure to obey administrative subpoenas.²⁴ And a statute providing that any person who "wilfully" refuses to testify or produce documents, in obedience to an administrative subpoena, shall be subject to criminal penalties,²⁵ fully protects one whose refusal is made in good faith and upon grounds which entitle him to the judgment of the court before obedience is compelled.²⁶

²² Blair v. Oesterlein Machine Co. (1927) 275 U. S. 220, 72 L. Ed. 249, 48 S. Ct. 87.

²³ Robertson v. Railroad Labor Board (1925) 268 U. S. 619, 69 L. Ed. 1119, 45 S. Ct. 621. See 3 Moore Federal Practice (1938) 3083.

²⁴ California v. Latimer (1938) 305 U. S. 255, 83 L. Ed. 159, 59 S. Ct. 166. See Interstate Commerce Commission v. Brimson (1894) 154 U. S.

447, 38 L. Ed. 1047, 14 S. Ct. 1125.

²⁵ Federal Power Act, 16 USCA 825f; the Railroad Retirement Acts, 45 USCA 228a through 228r.

²⁶ Federal Power Commission v. Metropolitan Edison Co. (1938) 304 U. S. 375, 82 L. Ed. 1408, 58 S. Ct. 963; California v. Latimer (1938) 305 U. S. 255, 83 L. Ed. 159, 59 S. Ct. 166.

SUBDIVISION VIII

PROCEDURE IN JUDICIAL REVIEW

§ 614. Introduction.

This portion of the book deals only with procedure on judicial review of administrative action. It does not cover administrative proceedings.¹

CHAPTER 37

JURISDICTION: FURTHER DEVELOPMENT OF METHODS OF JUDICIAL REVIEW

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¹ See § 149 et seq.

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I. IN GENERAL.

§ 615. Jurisdiction of State and Federal Courts Is Concurrent.

State and federal courts have concurrent jurisdiction of suits of a civil nature arising under the Constitution and laws of the United States, save in exceptional instances where the jurisdiction has been restricted by Congress to the federal courts.² Thus exhaustion of state judicial remedies is not a prerequisite to suit in a federal court.³

² Grubb v. Public Utilities Commis- 972, 50 S. Ct. 374. See also § 684.
sion (1930) 281 U. S. 470, 74 L. Ed. ³ See § 231.

and, where there is no state remedy at law, a federal court may grant equitable relief in the same case in which a state court could.⁴ The view that the commerce clause in some way operates to withhold from state courts jurisdiction of all suits relating to regulation or attempted regulation of interstate commerce has no support in any quarter, is at variance with the actual practice in this class of litigation, and is in conflict with the doctrine, often sustained by the Supreme Court, that state and federal courts, save in exceptional instances, have concurrent jurisdiction.⁵ A suit to set aside an order, is not a suit *in rem*, as where the court, either federal or state, first obtaining jurisdiction of the *res* holds it to the exclusion of another. Litigation can proceed in both courts, in virtue of their concurrent jurisdiction, until there is a final judgment in one,⁶ when that judgment would become conclusive in the other as *res judicata*.⁷

§ 616. Effect of Federal Rules of Civil Procedure.

The Federal Rules of Civil Procedure are not intended to alter the statutory methods for instituting suits for judicial review, although the conduct of such suits should be made to conform to the Rules so far as applicable.⁸

⁴ *Bohler v. Callaway* (1925) 267 U. S. 479, 69 L. Ed. 745, 45 S. Ct. 431.

⁵ *Grubb v. Public Utilities Commission* (1930) 281 U. S. 470, 74 L. Ed. 972, 50 S. Ct. 374.

⁶ *Grubb v. Public Utilities Commission* (1930) 281 U. S. 470, 74 L. Ed. 972, 50 S. Ct. 374; *Davega-City Radio v. Boland* (D. C. S. D. N. Y., 1938) 23 F. Supp. 969.

⁷ *Grubb v. Public Utilities Commission* (1930) 281 U. S. 470, 74 L. Ed. 972, 50 S. Ct. 374.

⁸ Rule 81 (a) (3) (4) (5) (6) of the Federal Rules of Civil Procedure:

"Rule 81. Applicability in General

"(a) To What Proceedings Applicable.

* * *

"(3) In proceedings under the Act of February 12, 1925, c. 213 (43 Stat. 883), U. S. C., Title 9, relating to arbitration, or under the Act of May 20, 1926, c. 347, § 9 (44 Stat.

585), U. S. C., Title 45, § 159, relating to boards of arbitration of railway labor disputes, these rules apply to appeals, but otherwise only to the extent that matters of procedure are not provided for in those statutes.

"(4) These rules do not alter the method prescribed by the Act of February 18, 1922, c. 57, § 2 (42 Stat. 388), U. S. C., Title 7, § 292; or by the Act of June 10, 1930, c. 436, § 7 (46 Stat. 534), as amended, U. S. C., Title 7, § 499g (c), for instituting proceedings in the district courts of the United States to review orders of the Secretary of Agriculture; or prescribed by the Act of June 25, 1934, c. 742, § 2 (48 Stat. 1214), U. S. C., Title 15, § 522, for instituting proceedings to review orders of the Secretary of Commerce; or prescribed by the Act of February 22, 1935, c. 18, § 5 (49 Stat. 31), U. S. C., Title 15, § 715d (c), as extended, for institut-

II. JURISDICTION OF SUITS TO ENFORCE ADMINISTRATIVE ORDERS

§ 617. Enforcement of Federal Administrative Orders.

Orders of federal administrative agencies, under statutory provisions, may be enforced in appropriate federal courts,⁹ or in a state court.¹⁰ The jurisdiction of a reviewing court is of the same character and scope in a proceeding for review brought by a person aggrieved by an order of an administrative agency as the jurisdiction which the court has in a proceeding instituted by the agency for enforcement.¹¹

ing proceedings to review orders of petroleum control boards; but the conduct of such proceedings in the district courts shall be made to conform to these rules so far as applicable.

“(5) These rules do not alter the practice in the district courts of the United States prescribed in the Act of July 5, 1935, c. 372, §§ 9 and 10 (49 Stat. 453), U. S. C., Title 29, §§ 159 and 160 (e), (g), and (i), for beginning and conducting proceedings to enforce orders of the National Labor Relations Board; and in respects not covered by those statutes, the practice in the district courts shall conform to these rules so far as applicable.

“(6) These rules do not apply to proceedings under the Act of September 13, 1888, c. 1015, § 13 (25 Stat. 479) as amended, U. S. C., Title 8, § 282, relating to deportation of Chinese; they apply to proceedings for enforcement or review of compensation orders under the Longshoremen's and Harbor Workers' Compensation Act, Act of March 4, 1927, c. 509, §§ 18, 21 (44 Stat. 1434, 1436), U. S. C., Title 33, §§ 918, 921, except to the extent that matters of procedure are provided for in that Act. The provisions for service by publication and allowing the defendant 60 days within which to answer in proceedings to cancel certificates of citizenship under the Act of June 29, 1906, c. 3592, § 15 (34 Stat. 601), as

amended, U. S. C., Title 8, § 405, remain in effect.”

⁹ See §§ 618-620.

¹⁰ 7 USCA 1365, 1366.

¹¹ “Under § 10 (f) the jurisdiction of the Circuit Court of Appeals is of the same character and scope in a proceeding for review brought by a person aggrieved by an order of the Board as the jurisdiction which the court has in a proceeding instituted by the Board for enforcement.

“While § 10 (f) assures to any aggrieved person opportunity to contest the Board's order, it does not require an unnecessary duplication of proceedings. The aim of the Act is to attain simplicity and directness both in the administrative procedure and on judicial review. Where the Board has petitioned for enforcement under § 10 (e) and the jurisdiction of the court has attached, no separate proceeding is needed on the part of the person thus brought into the court. The breadth of the jurisdiction conferred upon the court to set aside or modify in whole or in part the Board's order, or to permit new evidence to be taken, necessarily implies that the party proceeded against is entitled to raise all pertinent questions and to obtain any affirmative relief that is appropriate. * * *

“While in the instant case there are two proceedings, separately carried on the docket, they were essentially one so far as any question as to the

Some statutes provide for the bringing of a suit to enforce an administrative order in a district court,¹² or a Circuit Court of Appeals, including the Court of Appeals for the District of Columbia;¹³ for the institution by the attorney-general of a mandamus suit to compel obedience to the order,¹⁴ or a suit to recover a forfeiture.¹⁵

Where a statute provides for enforcement of an administrative order at the option of the attorney-general, the court may not acquire jurisdiction upon the consent of private parties, since the legislature intended that such suits should be instituted only upon the exercise of the judgment of the attorney-general.¹⁶ Although Congress has power to confer jurisdiction upon the courts to enforce administrative orders by the use of mandamus, such jurisdiction cannot be inferred from the mere direction to district attorneys and the attorney-general to institute all necessary proceedings for enforcement of a statute and administrative orders under it.¹⁷ Thus, there is no jurisdiction by virtue of such a statute alone to issue, at the instance of the agency, a writ of mandamus to compel a railroad company to make reports to the Interstate Commerce Commission in accordance with the Commission's order.¹⁸

§ 618. — Federal Trade Commission Act.

Jurisdiction of suits to enforce orders of the Federal Trade Commission, which were formerly instituted but now are no longer nec-

legality of the Board's order was concerned. Petitioner's answer in the Board's proceeding presented substantially the same objections as those raised in petitioner's proceeding for review." (Mr. Chief Justice Hughes in *Ford Motor Co. v. National Labor Relations Board* (1939) 305 U. S. 364, 369, 370, 83 L. Ed. 221, 59 S. Ct. 301.)

¹² Federal Communications Commission, 47 USCA 407; Interstate Commerce Commission, 49 USCA 16(2), 28 USCA 41, The Secretary of Agriculture, 7 USCA 608a(6).

¹³ Federal Trade Commission.

See former section 5 of the Federal Trade Commission Act, 38 Stat. 717 et seq., 15 USCA 45, no longer in effect.

National Labor Relations Board.

The National Labor Relations Act, 29 USCA 160 (e).

¹⁴ See *Federal Trade Commission v. Claire Furnace Co.* (1927) 274 U. S. 160, 71 L. Ed. 978, 47 S. Ct. 553.

¹⁵ See *Federal Trade Commission v. Claire Furnace Co.* (1927) 274 U. S. 160, 71 L. Ed. 978, 47 S. Ct. 553.

¹⁶ *Federal Trade Commission v. Claire Furnace Co.* (1927) 274 U. S. 160, 71 L. Ed. 978, 47 S. Ct. 553.

¹⁷ *Knapp v. Lake Shore & M. S. R. Co.* (1905) 197 U. S. 536, 49 L. Ed. 870, 25 S. Ct. 538.

¹⁸ *Knapp v. Lake Shore & M. S. R. Co.* (1905) 197 U. S. 536, 49 L. Ed. 870, 25 S. Ct. 538.

essary, did not depend upon proof of violation of the order sought to be enforced.¹⁹

§ 619. — Interstate Commerce Commission: Under the Urgent Deficiencies Act.

Under clause First of the Urgent Deficiencies Act,²⁰ district courts have jurisdiction to enforce, otherwise than by adjudication and collection of a forfeiture or penalty, or by infliction of criminal punishment, orders of the Interstate Commerce Commission other than for the payment of money.²¹ Orders for the payment of money—reparation orders—may be “enforced” through the medium of a plenary suit for damages in the federal district courts.²²

A suit by carriers against state officers to enjoin proceedings to impose penalties upon the carriers for obedience to an order of the Interstate Commerce Commission, is not a suit to enforce an order within the meaning of the Urgent Deficiencies Act. It is one under the general equity jurisdiction of the federal district court, and neither the United States nor the commission is required to be a party, either by statute or by the rules applicable to suits in equity.²³ An order to put half a carrier's net income in excess of six per cent. in a reserve fund, and to pay the other half to the Commission for the general railroad contingent fund, is not merely for the payment of money.²⁴

A state court does not have jurisdiction of a suit for damages under the Interstate Commerce Act, based on a reparation order of the Interstate Commerce Commission.²⁵

§ 620. — National Labor Relations Act: Delay Undesirable.

When a complaint in a suit to enforce an order of the National Labor Relations Board, involves the granting of affirmative relief against an employer, it is particularly desirable that the case be

¹⁹ Federal Trade Commission v. Baltimore Paint & Color Works (C. C. A. 4th, 1930) 41 F. (2d) 474.

The Federal Trade Commission need no longer sue to enforce its orders, such orders becoming final if a petition for review is not filed within sixty days from the date of service of the order, 15 USCA 45.

²⁰ Now 28 USCA 41 (27).

²¹ See Interstate Commerce Act,

§ 16 (12), 49 USCA 16 (12).

²² 49 USCA 16 (2).

²³ Illinois Cent. R. Co. v. Public Utilities Commission (1918) 245 U. S. 493, 62 L. Ed. 425, 38 S. Ct. 170.

²⁴ St. Louis & O'Fallon R. Co. v. United States (1929) 279 U. S. 461, 73 L. Ed. 798, 49 S. Ct. 384.

²⁵ Pennsylvania R. Co. v. Clark Bros. Coal Min. Co. (1915) 238 U. S. 456, 59 L. Ed. 1406, 35 S. Ct. 896.

prosecuted to a conclusion with as much expedition as is reasonably practicable.²⁶ The court has discretion to dismiss a petition for enforcement not filed with reasonable promptness.²⁷ Delay will not be considered to have been prejudicial, however, where it has not been urged upon the court as a factor to be considered in passing upon the petition for enforcement.²⁸

Where a court has jurisdiction of a suit to enforce an administrative order, it is the court's duty to enforce that order as written both in its prohibitory and in its mandatory phases if in its opinion the order is supported by valid findings and is such an order as under the law should properly have been entered. It is its duty to decline to enforce it, if in the opinion of the court it is not so supported by the law and the facts.²⁹

§ 621. State Administrative Orders.

There is no authority for a suit to enforce a state administrative order in the federal courts. Appropriate provisions for enforceability through state law are usually provided. These take a great variety of form, including mandamus.³⁰ State statutory provisions for enforcement of administrative orders may be assailed as denying due process. But where a state court by mandamus enforced an order while a suit to enjoin its enforcement was pending, due process was not lacking because of the fact that a bond had been posted to indemnify the railroad for the expenses of compliance with the mandamus suit.³¹

§ 622. — Decision of State Court Not Conclusive as to Waiver of Federal Rights.

Whether litigants have waived their federal rights, as by failure to prosecute an appeal under state procedure, is open to examination in the Supreme Court, and if it finds such rights not to be waived,

²⁶ National Labor Relations Board v. National Casket Co. (C. C. A. 2d, 1939) 107 F. (2d) 992; National Labor Relations Board v. La Salle Hat Co. (C. C. A. 3d, 1939) 105 F. (2d) 709.

²⁷ National Labor Relations Board v. La Salle Hat Co. (C. C. A. 3d, 1939) 105 F. (2d) 709.

²⁸ National Labor Relations Board v. National Casket Co. (C. C. A. 2d,

1939) 107 F. (2d) 992.

²⁹ National Labor Relations Board v. Boss Mfg. Co. (C. C. A. 7th, 1939) 107 F. (2d) 574.

³⁰ Michigan Cent. R. Co. v. Railroad Commission (1915) 236 U. S. 615, 59 L. Ed. 750, 35 S. Ct. 422.

³¹ Detroit & M. R. Co. v. Michigan Railroad Commission (1916) 240 U. S. 564, 60 L. Ed. 802, 36 S. Ct. 424.

it will enforce them notwithstanding a state decision to the contrary.³² The moment when litigants' federal rights are infringed is the first moment when they have a perfectly clear point which can be reviewed in the Supreme Court.³³

§ 623. Suits to Restrain Action Contrary to Administrative Direction.

A party may sue to enjoin a conspiracy to violate an administrative decision. But unless the decision affected legal rights, there is no enforceable duty, a combination to violate which would be a conspiracy, and equitable relief cannot be granted.³⁴

Suit may be brought to enjoin state officers from imposing penalties upon the plaintiff because it has obeyed the order of a federal agency. Where the United States and the federal agency are not parties, the defense in such suit constitutes a collateral attack on the order. The substantial evidence rule does not apply as it would upon a direct attack, and hence, to succeed, the attack must show that the order is void on the face of the findings, without regard to the evidence or the lack of it.³⁵ While such a suit is not a suit to enforce an order within the meaning of the Urgent Deficiencies Act³⁶ a cross bill in such suit praying that the order be set aside and annulled, is, in subject matter and purpose, a suit to set aside an order, which must be brought under the act. A federal court has no jurisdiction of such a cross bill under its general equity power.³⁷ While some cross bills against ordinary suitors may be entertained under the jurisdiction over the principal suit, no suit can be brought against the United States without its consent. Such consent has been given with regard to orders of the Interstate Commerce Commission only under the Urgent Deficiencies Act. Nor can the cross bills be retained as to the other parties. The United States must be a party to any suit to set aside a commission order: it is to represent the public.³⁸

³² New York Cent. R. Co. v. New York & Pennsylvania Co. (1926) 271 U. S. 124, 70 L. Ed. 865, 46 S. Ct. 447.

³³ New York Cent. R. Co. v. New York & Pennsylvania Co. (1926) 271 U. S. 124, 70 L. Ed. 865, 46 S. Ct. 447.

³⁴ Pennsylvania Railroad System and Allied Lines Federation v. Pennsylvania R. Co. (1925) 267 U. S. 203, 69 L. Ed. 574, 45 S. Ct. 307. See also § 187 et seq.

³⁵ State of New York v. United

States (1922) 257 U. S. 591, 66 L. Ed. 385, 42 S. Ct. 239.

³⁶ Illinois Cent. R. Co. v. Public Utilities Commission (1918) 245 U. S. 493, 62 L. Ed. 425, 38 S. Ct. 170.

³⁷ Illinois Cent. R. Co. v. Public Utilities Commission (1918) 245 U. S. 493, 62 L. Ed. 425, 38 S. Ct. 170.

³⁸ Illinois Cent. R. Co. v. Public Utilities Commission (1918) 245 U. S. 493, 62 L. Ed. 425, 38 S. Ct. 170.

Where relief sought in a state court would circumvent orders of the Interstate Commerce Commission, a federal district court may enjoin the parties affected from performing the acts in violation of the orders, despite the provisions of section 265 of the Judicial Code.³⁹

An allegation of irreparable injury may be unnecessary in a suit to enjoin violation of an administrative order, if the statute authorizes an injunction upon a showing of violation alone.⁴⁰

§ 624. Enforcement by Suit for Penalties at Instance of Private Party.

A state does not deny due process by providing that a state commission's rate orders shall be enforced by suits for penalties for overcharges by private parties, not confined or proportioned to their losses or damages. The legislature may adjust the amount to the public wrong, rather than the private injury.⁴¹ The power of the state to impose fines and penalties for violation of its statutory requirements is coeval with government, and the mode in which they are enforced, whether at the suit of a private party, or at the suit of the public, and what disposition shall be made of the amounts collected, are merely matters of legislative discretion, so long as the penalty prescribed is not so severe and oppressive as to be wholly disproportioned to the offense and obviously unreasonable.⁴²

III. JURISDICTION OF SUITS TO SUSPEND, ENJOIN, ANNUL, OR SET ASIDE ADMINISTRATIVE ORDERS

A. In General

§ 625. Introduction.

This subdivision should be read in conjunction with the chapter on the requirement that, to be judicially reviewable, administrative orders must be of a definitive character.⁴³ Upon judicial review courts are generally courts of equity.⁴⁴

³⁹ 28 USCA 379. *Miller v. Climax Molybdenum Co.* (C. C. A. 10th, 1938) 96 F. (2d) 254. See also § 248.

⁴⁰ The Agricultural Adjustment Act, 7 USCA 608a (6). *American Fruit Growers v. United States* (C. C. A. 9th, 1939) 105 F. (2d) 722.

⁴¹ *St. Louis, I. M. & S. R. Co. v.*

Williams (1919) 251 U. S. 63, 64 L. Ed. 139, 40 S. Ct. 71.

⁴² *St. Louis, I. M. & S. R. Co. v. Williams* (1919) 251 U. S. 63, 64 L. Ed. 139, 40 S. Ct. 71.

⁴³ See § 195 et seq.

⁴⁴ See § 253 et seq.

§ 626. Orders of Federal Administrative Agencies.

Federal courts may have jurisdiction of suits to suspend, enjoin, annul, or set aside orders of federal administrative agencies under specific statutes, such as those providing for review in a specially constituted district court of three judges,⁴⁵ or in a Circuit Court of Appeals,⁴⁶ or, under specific statutory provisions, in a state court.⁴⁷ If no specific statutory mode of judicial review is provided, orders of federal administrative agencies may be reviewable in a one judge district court.⁴⁸ If there is a substantial constitutional question as to the validity of a federal statute involved, judicial review of a federal administrative order is possible in a three judge district court pursuant to 28 USCA 380a.⁴⁹

Original jurisdiction of the United States Supreme Court does not include a suit by a state to enjoin or set aside orders of a federal agency affecting that state.⁵⁰

§ 627. — Negative Order Rule Abolished.

The so called "negative order" rule, by which judicial review was refused of orders which refused to grant relief or command action as contrasted with "affirmative" orders which did grant relief and command action, has been repudiated.⁵¹ As a result the so-called "negative order" rule no longer has any force whatever in connection with judicial review of orders of any administrative agency, and earlier decisions to the contrary have been overruled by implication.⁵² The right to judicial review in respect of negative orders is now governed by orthodox criteria.⁵³

§ 628. Orders of State Administrative Agencies.

A state remedy is usually available for review of an order of a state administrative agency. In addition to an available state remedy, suit in equity in a federal district court is ordinarily also available if a federal question, such as violation of a federal constitutional right,

⁴⁵ See §§ 633, 672 et seq.

⁴⁶ See the statutes collected in Appendix A, §§ 831-860, see also, §§ 645, 649.

⁴⁷ 7 USCA 1365, 1366.

⁴⁸ See § 650.

⁴⁹ See § 683.

⁵⁰ *Texas v. Interstate Commerce Commission* (1922) 258 U. S. 158, 66 L. Ed. 531, 42 S. Ct. 261; *State ex*

rel. Lemke v. Chicago & N. W. Ry. Co. (1922) 257 U. S. 485, 66 L. Ed. 329, 42 S. Ct. 170.

⁵¹ * *Rochester Telephone Corp. v. United States* (1939) 307 U. S. 125, 89 L. Ed. 1147, 59 S. Ct. 754.

⁵² See note, "Reviewability of Negative Orders," (1939) 53 *Harv. L. Rev.* 98.

⁵³ See § 205.

is involved. But in state rate cases, and in cases seeking to enjoin the collection of a state tax, the right to sue in a federal court has been restricted by the Johnson Act.⁵⁴ Practical cognizance must also be taken of the increasing disinclination of the federal courts to interfere with state administrative action in the absence of manifest oppression.⁵⁵ Orders of state administrative agencies may nevertheless be judicially reviewed, within these restrictions, in a proper case under section 266 of the Judicial Code in a three judge district court,⁵⁶ or, in certain circumstances, under the general equity jurisdiction of a one judge district court.⁵⁷

§ 629. Orders of Local Administrative Units.

Orders of local administrative units, which are not state agencies, are reviewable only in a one judge district court.⁵⁸

§ 630. Three Provisions for Assembly of a Three Judge District Court.

There are three more or less similar statutory provisions for the assembly of a three judge district court to review administrative orders, (1) the Urgent Deficiencies Act, for review of orders of the Interstate Commerce Commission and certain other federal agencies,⁵⁹ (2) section 266 of the Judicial Code, for review of orders of state administrative agencies,⁶⁰ and (3) the Act of 1937, 28 USCA 380a, which permits review of administrative orders of federal agencies where a substantial question as to the validity of a federal statute is also involved.⁶¹

§ 631. Review of Series of Orders in One Suit.

Where an order of an administrative agency is assailed by an original bill in a federal district court, a further or supplemental order of the agency, subsequently made, may be reviewed by an amended or supplemental bill in the same suit.⁶² Where the first order has been reviewed by a three judge court pursuant to section 266 of the

⁵⁴ 28 USCA 41 (1). See also § 671.

⁵⁵ *Petroleum Exploration v. Public Service Commission* (1938) 304 U. S. 209, 82 L. Ed. 1294, 58 S. Ct. 834.

⁵⁶ 28 USCA 380. See also § 672 et seq.

⁵⁷ See § 650 et seq.

⁵⁸ See § 676.

⁵⁹ See § 633 et seq.

⁶⁰ 28 USCA 380. See also § 672.

⁶¹ See § 683.

⁶² *Thompson v. Consolidated Gas Utilities Corp.* (1937) 300 U. S. 55, 81 L. Ed. 510, 57 S. Ct. 364; *McCart v. Indianapolis Water Co.* (1938) 302 U. S. 419, 82 L. Ed. 336, 58 S. Ct. 324.

Judicial Code,⁶³ it is permissible to review the subsequent order before a one judge district court under its general equity powers, if a three judge court under section 266 is not required in the second case.⁶⁴ However, it has been held that an attempt to review administrative determinations made in one proceeding, by a suit to enjoin an administrative order made as the result of a later one, is an attempt to challenge administrative determinations collaterally, which cannot be done in this manner.⁶⁵

B. Under Particular Statutory Modes of Review

§ 632. In General.

Where a statutory method of judicial review is provided, review may be had only in the court and upon the terms specified in the statute in so far as they are applicable.⁶⁶ The court may not dispense with applicable statutory provisions even to do equity.⁶⁷ Such statutory jurisdiction is exclusive, and its existence prevents collateral review. Thus, the validity of a license issued by the Federal Power Commission may not be tested by suggesting its invalidity as a defense, in condemnation proceedings.⁶⁸

Where no specific statutory mode of review is provided a suit to enjoin, suspend, annul or set aside an administrative order may be brought in a federal district court upon allegations which establish federal equity jurisdiction.⁶⁹ Where a suit arises under a law regulating commerce, the district courts have jurisdiction, under Judicial Code, section 24 (8) ⁷⁰ despite the fact that the amount at issue may be smaller than the jurisdictional amount otherwise required.⁷¹

⁶³ 28 USCA 380.

⁶⁴ *McCart v. Indianapolis Water Co.* (1938) 302 U. S. 419, 82 L. Ed. 336, 58 S. Ct. 324.

⁶⁵ *Board of Public Utility Com'rs of New Jersey v. United States* (D. C. D. N. J., 1937) 21 F. Supp. 543.

⁶⁶ *Securities & Exchange Commission v. Andrews* (C. C. A. 2d, 1937) 88 F. (2d) 441. See *Sykes v. Jenny Wren Co.* (1935) 64 App. D. C. 379, 78 F. (2d) 729, 104 A. L. R. 864, cert. den. 296 U. S. 624, 80 L. Ed. 443, 56 S. Ct. 147.

⁶⁷ *Universal Service Wireless v.*

Federal Radio Commission (1930) 59 App. D. C. 319, 41 F. (2d) 113; *Village of Mantorville v. Chicago Great Western R. Co.* (D. C. D. Minn., 1st Div., 1934) 8 F. Supp. 791.

⁶⁸ *Harris v. Central Nebraska Public Power & Irrigation Dist.* (D. C. D. Neb., North Platte Div., 1938) 29 F. Supp. 425.

⁶⁹ See § 650.

⁷⁰ 28 USCA 41 (8).

⁷¹ *Turner, D. & L. Lumber Co. v. Chicago, M. & St. P. R. Co.* (1926) 271 U. S. 259, 70 L. Ed. 934, 46 S. Ct. 530.

1. Under the Urgent Deficiencies Act and Similar Statutes

§ 633. The Urgent Deficiencies Act: Special Provisions for Review of Orders of the Interstate Commerce Commission.

The district courts have special jurisdiction of cases brought to enjoin, set aside, annul or suspend in whole or in part any order of the Interstate Commerce Commission.⁷² The Urgent Deficiencies Act⁷³ requires three-judge courts and expedited procedure for review of orders of the Interstate Commerce Commission. It provides that suits to suspend, enjoin, annul or set aside an order of the Interstate Commerce Commission shall be brought in a three-judge district court convened pursuant to the Act;⁷⁴ and that no interlocutory injunction against an order of the commission shall issue except from a three-judge district court.⁷⁵ Such court may also allow a temporary stay of the order, for not more than sixty days, in cases where irreparable injury would otherwise ensue. This temporary stay may be continued, at the time of hearing the application for the interlocutory injunction, until decision upon the application. The hearing upon the application shall be given precedence and in every way expedited.

An appeal may be taken direct to the Supreme Court from the decree of the three-judge court granting⁷⁶ or denying⁷⁷ an interlocutory injunction.

Upon the final hearing of any suit to suspend, enjoin, set aside or annul⁷⁸ an order of the Interstate Commerce Commission, the same requirement as to judges and the same procedure as to expedition and appeal shall apply. The procedure stipulated in the act does not

⁷² 28 USCA 41 (28).

⁷³ Act of October 22, 1913, c. 32, 38 Stat. 208 et seq.; 28 USCA 43-48.

⁷⁴ See § 844.

⁷⁵ Or three judges sitting in the District Court of the District of Columbia at least one of whom is a judge of the Court of Appeals of that District. *Claiborne-Annapolis Ferry Co. v. United States* (1932) 285 U. S. 382, 76 L. Ed. 808, 52 S. Ct. 440.

See *Valvoline Oil Co. v. United States* (1939) 308 U. S. 141, 84 L. Ed. 151, 60 S. Ct. 160.

⁷⁶ *United States v. Maher* (1939) 307 U. S. 148, 83 L. Ed. 1162, 59 S. Ct. 768, rehearing denied 307 U. S.

649, 83 L. Ed. 1528, 59 S. Ct. 831.

⁷⁷ *Atchison, T. & S. F. R. Co. v. United States* (1935) 295 U. S. 193, 79 L. Ed. 1382, 55 S. Ct. 748.

⁷⁸ There is no magic in the choice of these five words as the basis for relief sought. Most suits are brought to "suspend" or "enjoin" an order because affirmative action is threatened, but for instances of suits brought merely to "set aside" or "annul" an order, see *Powell v. United States* (1937) 300 U. S. 276, 81 L. Ed. 643, 57 S. Ct. 470, and *St. Louis & O'Fallon R. Co. v. United States* (1929) 279 U. S. 461, 73 L. Ed. 798, 49 S. Ct. 384.

change the inherently equitable nature of a suit seeking such relief.⁷⁹

Congress has manifested its solicitude that the power to grant writs of injunction against orders of the Interstate Commerce Commission shall be exercised with special care, by requiring the consideration of applications to be made by three judges and by giving an appeal directly to the Supreme Court both in the case of interlocutory orders and final decrees.⁸⁰

The United States must be made a party to suits under the Urgent Deficiencies Act. This is not a mere matter of procedure, but to protect the public interest.⁸¹ Thus, where a state brings an original suit in the Supreme Court to enjoin the enforcement of an order of the Interstate Commerce Commission, the proceeding is one in equity, in which the complete requirements of justice and public policy must be taken into account. When they are considered it is clear that the state should be remitted to the statutory suit in the district court, in which the United States is made a party. Complete justice requires that the railroads should not be subject to two irreconcilable commands—that of the commission enforced by a decree on one side, and that of the Supreme Court on the other.⁸²

In view of the importance of the questions and amounts involved, courts, in suits under the Urgent Deficiencies Act, should give the reasons on which they rest their decisions, and not enter a decree without opinion, statement of reasons, or citation of authority.⁸³

Jurisdiction under the Act is invoked by filing in the office of the clerk of the court a written petition setting forth briefly and succinctly the facts constituting the petitioner's cause of action, and specifying the relief sought.⁸⁴

§ 634. History of the Act.

The three extraordinary features of the Urgent Deficiencies Act, (1) hearing before three judges, (2) direct appeal to the Supreme Court as of right, (3) precedence in both the district court and the

⁷⁹ See *Alton R. Co. v. United States* (1932) 287 U. S. 229, 77 L. Ed. 275, 53 S. Ct. 124. See also § 253.

⁸⁰ *Alabama v. United States* (1929) 279 U. S. 229, 73 L. Ed. 675, 49 S. Ct. 266.

⁸¹ Judicial Code, § 211; 28 USCA 48. *State ex rel. Lemke v. Chicago & N. W. Ry. Co.* (1922) 257 U. S. 485, 66 L. Ed. 329, 42 S. Ct. 170; *Illinois*

Cent. R. Co. v. Public Utilities Commission (1918) 245 U. S. 493, 62 L. Ed. 425, 38 S. Ct. 170.

⁸² *State ex rel. Lemke v. Chicago & N. W. Ry. Co.* (1922) 257 U. S. 485, 66 L. Ed. 329, 42 S. Ct. 170.

⁸³ *Baltimore & O. R. Co. v. United States* (1929) 279 U. S. 781, 73 L. Ed. 954, 49 S. Ct. 492. See also § 784.

⁸⁴ 28 USCA 45.

Supreme Court were first introduced by the Expediting Act of 1903⁸⁵ for suits by the United States to enforce the antitrust and commerce laws. They were extended by the Hepburn Act of 1906, section 5,⁸⁶ to suits to enforce or to enjoin and set aside orders of the Interstate Commerce Commission. This statutory jurisdiction to review orders was first granted in 1906, because then, for the first time, the rate-making power was conferred upon the commission, and then disobedience of its orders was first made punishable.⁸⁷ The jurisdiction conferred by the Hepburn Act on the circuit courts was transferred, substantially unchanged, to the Commerce Court in 1910,⁸⁸ and when that court was abolished, to the district courts, by the Urgent Deficiencies Act.⁸⁹

§ 635. Jurisdiction Under the Act Exclusive.

Federal district courts, specially constituted under the act, have exclusive jurisdiction of suits to enjoin, set aside, annul, or suspend orders of the Interstate Commerce Commission, and such suits may not be brought elsewhere.⁹⁰ Jurisdiction is exclusive because the United States is an indispensable party and has consented to be sued only in a statutory three-judge court convened pursuant to the Urgent Deficiencies Act.⁹¹ The jurisdiction of a one-judge federal district

⁸⁵ 32 Stat. 823, 15 USCA 28, 29.

⁸⁶ 34 Stat. 584, 590, 592, 49 USCA 16.

⁸⁷ *United States v. Los Angeles & S. L. R. Co.*, (1927) 273 U. S. 299, 71 L. Ed. 651, 47 S. Ct. 413. See *United States v. Griffin* (1938) 303 U. S. 226, 82 L. Ed. 764, 58 S. Ct. 601.

⁸⁸ Act of June 18, 1910, c. 309, § 1, 36 Stat. 539. *Virginian Ry. Co. v. United States* (1926) 272 U. S. 658, 71 L. Ed. 463, 47 S. Ct. 222.

⁸⁹ Act of October 22, 1913, c. 32; 38 Stat. 208 et seq.; 28 USCA 43 et seq. *United States v. Griffin* (1938) 303 U. S. 226, 82 L. Ed. 764, 58 S. Ct. 601; *United States v. Los Angeles & S. L. R. Co.* (1927) 273 U. S. 299, 71 L. Ed. 651, 47 S. Ct. 413.

⁹⁰ Judicial Code, § 208, 28 USCA 46.

Central New England R. Co. v. Boston & A. R. Co. (1929) 279 U. S. 415, 73 L. Ed. 770, 49 S. Ct. 358; *State ex rel. Lemke v. Chicago & N. W. Ry. Co.* (1922) 257 U. S. 485, 66 L. Ed. 329, 42 S. Ct. 170; *Lambert Run Coal Co. v. Baltimore & O. R. Co.* (1922) 258 U. S. 377, 66 L. Ed. 671, 42 S. Ct. 349. See *Illinois Cent. R. Co. v. Public Utilities Commission* (1918) 245 U. S. 493, 62 L. Ed. 425, 38 S. Ct. 170.

⁹¹ *Lambert Run Coal Co. v. Baltimore & O. R. Co.* (1922) 258 U. S. 377, 66 L. Ed. 671, 42 S. Ct. 349; *State ex rel. Lemke v. Chicago & N. W. Ry. Co.* (1922) 257 U. S. 485, 66 L. Ed. 329, 42 S. Ct. 170; *Illinois Cent. R. Co. v. Public Utilities Commission* (1918) 245 U. S. 493, 62 L. Ed. 425, 38 S. Ct. 170.

court may not be invoked by original suit,⁹² or upon removal from a state court. State courts also lack jurisdiction.⁹³

A state must sue to enforce the enforcement of an order of the Interstate Commerce Commission in the three-judge district court. The bill in an original suit in the Supreme Court will be dismissed.⁹⁴

§ 636. — Form of Relief Sought Cannot Preclude Jurisdiction Where Substance of Suit Within Act.

The exclusive jurisdiction and requirements of the Urgent Deficiencies Act may not be avoided by change in form of action or the specific mode of relief sought, if the substance of the suit is to suspend, enjoin, annul or set aside an order of the Commission.⁹⁵ It makes no difference that the order is not mandatory but permissive,⁹⁶ or that the suit is not in form against the agency itself.⁹⁷ A bill which does not expressly pray that an order be annulled or set aside but assails the validity of the order and prays that the defendant be enjoined from doing what the order specifically authorizes, is the equivalent to one asking that the order be adjudged invalid and set aside, and falls within the act.⁹⁸ A suit by a minority stockholder of a railway company, the company being made sole defendant, to enjoin it from carrying out an agreement approved and authorized by an order of the Interstate Commerce Commission, is essentially a suit to annul or set aside the order, and is within the act.⁹⁹ A suit to restrain a railroad from following rules relating to car service prescribed by order of the Interstate Commerce Commission is in substance a suit to set aside the order and within the act.¹

⁹² *Lambert Run Coal Co. v. Baltimore & O. R. Co.* (1922) 258 U. S. 377, 66 L. Ed. 671, 42 S. Ct. 349. See *Illinois Cent. R. Co. v. Public Utilities Commission* (1918) 245 U. S. 493, 62 L. Ed. 425, 38 S. Ct. 170.

⁹³ *Venner v. Michigan Cent. R. Co.* (1926) 271 U. S. 127, 70 L. Ed. 868, 46 S. Ct. 444; *Lambert Run Coal Co. v. Baltimore & O. R. Co.* (1922) 258 U. S. 377, 66 L. Ed. 671, 42 S. Ct. 349.

⁹⁴ *State ex rel. Lemke v. Chicago & N. W. Ry. Co.* (1922) 257 U. S. 485, 66 L. Ed. 329, 42 S. Ct. 170.

⁹⁵ *Lambert Run Coal Co. v. Baltimore & O. R. Co.* (1922) 258 U. S. 377,

66 L. Ed. 671, 42 S. Ct. 349.

⁹⁶ *Venner v. Michigan Cent. R. Co.* (1926) 271 U. S. 127, 70 L. Ed. 868, 46 S. Ct. 444.

⁹⁷ *Lambert Run Coal Co. v. Baltimore & O. R. Co.* (1922) 258 U. S. 377, 66 L. Ed. 671, 42 S. Ct. 349.

⁹⁸ *Venner v. Michigan Cent. R. Co.* (1926) 271 U. S. 127, 70 L. Ed. 868, 46 S. Ct. 444.

⁹⁹ *Venner v. Michigan Cent. R. Co.* (1926) 271 U. S. 127, 70 L. Ed. 868, 46 S. Ct. 444.

¹ *Lambert Run Coal Co. v. Baltimore & O. R. Co.* (1922) 258 U. S. 377, 66 L. Ed. 671, 42 S. Ct. 349.

Nor is application of the act avoided because the true nature of the suit does not appear from the bill of complaint. If and when it appears from other pleadings, motions, or other development in a suit not brought under the act, that the nature of the suit is within the scope of the act, the complaint must be dismissed for want of jurisdiction.²

§ 637. — Extends to the Entire Suit: Duty to Retain Jurisdiction.

The jurisdiction of the three-judge court necessarily includes power to make all orders required to enforce the rights and obligations of the parties that arise in the litigation.³ Thus, where a decree of the three-judge court is reversed and the cause remanded, an application for restitution of sums lost by compulsion of the erroneous decree is incidental to and in effect part of the main suit. A three-judge court is required for entry of the decree upon the mandate of the Supreme Court,⁴ its duty is to retain jurisdiction, enter a decree that appellants are entitled to restitution, and refer the case to a master as prayed in appellants' motion.⁵ And appeal from the second decree rests upon the same foundation as did the first appeal.⁶

Where the issues stated in the pleadings require a three-judge court for their disposition, the statutory court retains jurisdiction even when by amendment the issues which bring the suit within the act are withdrawn.⁷

§ 638. — Limitation on Jurisdiction: Separable Claims.

Claims for relief separable from suits within the act may not be joined with a claim for relief which falls within the act and its special requirements and privileges.⁸

An application for an injunction because a carrier's directors hold office illegally, are faithless to their trust, are acting in violation of state law, and hence that the carrier cannot legally exercise the au-

² *Lambert Run Coal Co. v. Baltimore & O. R. Co.* (1922) 258 U. S. 377, 66 L. Ed. 671, 42 S. Ct. 349.

³ *Baltimore & O. R. Co. v. United States* (1929) 279 U. S. 781, 73 L. Ed. 954, 49 S. Ct. 492.

⁴ *Baltimore & O. R. Co. v. United States* (1929) 279 U. S. 781, 73 L. Ed. 954, 49 S. Ct. 492.

⁵ *Baltimore & O. R. Co. v. United States* (1929) 279 U. S. 781, 73 L. Ed. 954, 49 S. Ct. 492. See also § 711.

⁶ *Baltimore & O. R. Co. v. United States* (1929) 279 U. S. 781, 73 L. Ed. 954, 49 S. Ct. 492.

⁷ *Texas Electric Ry. Co. v. Eastus* (D. C. N. D. Tex., Dallas Div., 1938) 25 F. Supp. 825, mem. aff'd (1939) 308 U. S. 512, 84 L. Ed. 437, 60 S. Ct. 134.

⁸ *Pittsburgh & W. Va. Ry. Co. v. United States* (1930) 281 U. S. 479, 74 L. Ed. 980, 50 S. Ct. 378.

thority given it by an order of the Interstate Commerce Commission, is not properly joined in a suit under the Urgent Deficiencies Act and is not subject to review in the Supreme Court on direct appeal.⁹ It is neither ancillary to¹⁰ nor dependent upon the judgment as to the order.¹¹ Relief of that character may be had only in a suit invoking the plenary equity jurisdiction of the federal district court. Such a suit is heard in the ordinary course by a single judge and is appealable only to the Circuit Court of Appeals.¹² Erroneously joining an application for relief under plenary equity power with an application under the Urgent Deficiencies Act, gives no right to direct appeal under that act, and is cause for dismissal of the bill, but without prejudice to rights in a proper proceeding before one judge.¹³

The statutory court convened under the act has no jurisdiction to enjoin the Interstate Commerce Commission from issuing an order.¹⁴

Dismissal of a bill for want of jurisdiction by a three-judge court convened pursuant to the Urgent Deficiencies Act should be without prejudice to suit in an appropriate forum.¹⁵

§ 639. — Lack of Jurisdiction May Not Be Waived.

Lack of jurisdiction under the act may not be waived by the parties, but on the contrary may be raised by either district or appellate court, *sua sponte*, at any time.¹⁶

§ 640. Appeals.

Appeals to the Supreme Court under the Urgent Deficiencies Act have priority in hearing and determination over all other causes ex-

⁹ Pittsburgh & W. Va. Ry. Co. v. United States (1930) 281 U. S. 479, 74 L. Ed. 980, 50 S. Ct. 378. Cf. Cleveland, C., C. & St. L. R. Co. v. United States (1928) 275 U. S. 404, 72 L. Ed. 338, 48 S. Ct. 189.

¹⁰ As in The Chicago Junction Case (1924) 264 U. S. 258, 264, 68 L. Ed. 667, 44 S. Ct. 317, where joinder was permitted in order to carry out the purpose of Congress to make judicial review effective. Pittsburgh & W. Va. Ry. Co. v. United States (1930) 281 U. S. 479, 488, 74 L. Ed. 980, 50 S. Ct. 378.

¹¹ Pittsburgh & W. Va. Ry. Co. v. United States (1930) 281 U. S. 479, 74 L. Ed. 980, 50 S. Ct. 378.

¹² Pittsburgh & W. Va. Ry. Co. v. United States (1930) 281 U. S. 479, 74 L. Ed. 980, 50 S. Ct. 378.

¹³ Pittsburgh & W. Va. Ry. Co. v. United States (1930) 281 U. S. 479, 74 L. Ed. 980, 50 S. Ct. 378.

¹⁴ Manhattan Transit Co. v. United States (D. C. D. Mass., 1938) 24 F. Supp. 174.

¹⁵ Pittsburgh & W. Va. Ry. Co. v. United States (1930) 281 U. S. 479, 74 L. Ed. 980, 50 S. Ct. 378.

¹⁶ United States v. Griffin (1938) 303 U. S. 226, 82 L. Ed. 764, 58 S. Ct. 601; Lambert Run Coal Co. v. Baltimore & O. R. Co. (1922) 258 U. S. 377, 66 L. Ed. 671, 42 S. Ct. 349.

cept criminal causes in that court.¹⁷ The taking of an appeal shall in no case supersede or stay the judgment or decree of the district court appealed from, unless the supreme court or a justice thereof shall so direct, and the appellant shall give an appropriate bond.¹⁸ The district court may direct the original record instead of a transcript thereof to be transmitted on appeal.¹⁹

Section 238 of the Judicial Code²⁰ limits direct appeal to the Supreme Court, to, *inter alia*, a decree within "so much" of the Urgent Deficiencies Act "as relates to . . . suits to enforce, suspend, or set aside orders of the Interstate Commerce Commission other than for the payment of money." But "other than for the payment of money" refers only to suits to enforce orders²¹ and not to suits to suspend or set aside. They do not inhibit direct review of any cause formerly cognizable by the Commerce Court.²²

§ 641. Orders Reviewable Under the Act.

Not everything denominated "order" is reviewable under the act, but the orthodox criteria for judicial review now govern.²³ Orders reviewable under the act also include "negative" orders,²⁴ an order directing that a tariff be stricken from the files of the commission,²⁵ and an order prescribing accounting practices.²⁶

§ 642. Orders Not Reviewable Under the Act.

The Urgent Deficiencies Act does not apply to action of the Interstate Commerce Commission which is not within the commission's delegated power to regulate commerce.²⁷ Thus a certificate issued by the commission under the Transportation Act of 1920, determining the amount of money to be distributed to a railroad to make good the

¹⁷ 28 USCA 47a.

¹⁸ 28 USCA 47a.

¹⁹ 28 USCA 47a.

²⁰ 28 USCA 345.

²¹ *St. Louis & O'Fallon R. Co. v. United States* (1929) 279 U. S. 461, 73 L. Ed. 798, 49 S. Ct. 384. See also § 617 et seq.

²² *St. Louis & O'Fallon R. Co. v. United States* (1929) 279 U. S. 461, 73 L. Ed. 798, 49 S. Ct. 384.

²³ See § 195 et seq.

²⁴ *Rochester Telephone Corp. v.*

United States (1939) 307 U. S. 125, 83 L. Ed. 1147, 59 S. Ct. 754.

²⁵ *Powell v. United States* (1937) 300 U. S. 276, 81 L. Ed. 643, 57 S. Ct. 470.

²⁶ *Norfolk & W. Ry. Co. v. United States* (D. C. W. D. Va., 1931) 52 F. (2d) 967, aff'd (1932) 287 U. S. 134, 77 L. Ed. 218, 53 S. Ct. 52.

²⁷ *Great Northern R. Co. v. United States* (1928) 277 U. S. 172, 72 L. Ed. 838, 48 S. Ct. 466.

government's guaranty, was not an exertion of the delegated power to regulate interstate commerce, but a temporary, non-recurrent incident of the World War. Congress could have selected any other agency. Hence the special remedy of the Urgent Deficiencies Act is not available to review the legality of the commission's action.²⁸ Moreover, certificates of the amount due a railroad under the Transportation Act of 1920, for war services, are findings rather than orders.²⁹

Suits to enjoin, set aside, or annul orders for the payment of money are within the act. The exclusion of such suits was previously found only in a separate clause, referring to suits to enforce orders.³⁰ But reparation orders may not be assailed in such suits.^{30a}

An order determining railway mail pay is not reviewable under the act since (1) there is no wide public interest in its speedy determination, and (2) no interruption of service is possible through improvident issue of an injunction by a single judge.³¹ There is nothing in the Railway Mail Pay Act³² which requires that the act be made applicable to the determination of the validity of orders of the Interstate Commerce Commission fixing proper compensation to be paid by the government to a railroad for use of its property in carrying mail.³³ Moreover, since a suit to set aside an order concerning mail pay is one primarily against the United States, there is no jurisdiction under the Urgent Deficiencies Act because the Railway Mail Pay Act does not confer such authority to sue the United States.³⁴

A suit to correct alleged errors in the findings upon which an order is based cannot be brought under the Urgent Deficiencies Act.³⁵

²⁸ Great Northern R. Co. v. United States (1928) 277 U. S. 172, 72 L. Ed. 838, 48 S. Ct. 466.

²⁹ Great Northern R. Co. v. United States (1928) 277 U. S. 172, 72 L. Ed. 838, 48 S. Ct. 466.

³⁰ 36 Stat. 539, former section 41 (27), 28 USCA. St. Louis & O'Fallon R. Co. v. United States (1929) 279 U. S. 461, 73 L. Ed. 798, 49 S. Ct. 384; Baltimore & O. R. Co. v. United States (C. C. A. 3d, 1937) 87 F. (2d) 605. See also § 617 et seq.

^{30a} Baltimore & O. R. Co. v. United States (C. C. A. 3d, 1937) 87 F. (2d) 605; Brady v. Interstate Commerce Commission (D. C. N. D. W. Va., 1930)

43 F. (2d) 847, mem. aff'd (1931) 283 U. S. 804, 75 L. Ed. 1424, 51 S. Ct. 559.

³¹ United States v. Griffin (1938) 303 U. S. 226, 82 L. Ed. 764, 58 S. Ct. 601.

³² 39 USCA 524, 541.

³³ United States v. Griffin (1938) 303 U. S. 226, 82 L. Ed. 764, 58 S. Ct. 601.

³⁴ United States v. Griffin (1938) 303 U. S. 226, 82 L. Ed. 764, 58 S. Ct. 601.

³⁵ Brady v. Interstate Commerce Commission (D. C. N. D. W. Va., 1930) 43 F. (2d) 847, mem. aff'd (1931) 283 U. S. 804, 75 L. Ed. 1424, 51 S. Ct. 559.

§ 643. Application of Act to Other Agencies.

Procedure under the Act has been specifically extended to apply to suits assailing orders of the Interstate Commerce Commission under the Inland Waterways Corporation Act of 1924,³⁶ the Emergency Railroad Transportation Act of 1933,³⁷ and the Motor Carrier Act of 1935;³⁸ of the Secretary of Commerce under the Shipping Act of 1916,³⁹ of the United States Shipping Board under the Shipping Act of 1916,⁴⁰ of the Secretary of Agriculture under the Packers and Stockyards Act of 1921,⁴¹ and the Perishable Agricultural Commodities Act of 1930,⁴² of the Federal Coordinator of Transportation under the Emergency Railroad Transportation Act of 1933,⁴³ of the Federal Communications Commission under the Communications Act of 1934,⁴⁴ and elsewhere.⁴⁵

§ 644. The Federal Power Act.

The Federal Power Act⁴⁶ while similar to the Urgent Deficiencies Act, contains a distinctive formulation of the conditions under which resort to the courts may be made. Section 313 (b)^{46a} provides that

³⁶ Act of June 3, 1924, 43 Stat. 360 as amended 45 Stat. 978, 49 USCA 153 (e).

³⁷ 48 Stat. 211, 216, amended 49 Stat. 376. The Act expired June 17, 1936. See 49 USCA 250 note.

³⁸ 49 Stat. 543, 550, 49 USCA 305 (b). Cf. Transportation of Explosives Act (Criminal Code, § 233) 35 Stat. 554, 555, amended 35 Stat. 1088, 1135, 41 Stat. 1445, 18 USCA 383.

³⁹ 46 USCA 830. *Swayne & Hoyt v. United States* (1937) 300 U. S. 297, 81 L. Ed. 659, 57 S. Ct. 478; *Isbrandtsen-Moller Co., Inc. v. United States* (1937) 300 U. S. 139, 81 L. Ed. 562, 57 S. Ct. 407.

⁴⁰ 39 Stat. 728, 738, superseded by 49 Stat. 1985, 46 USCA 1101 et seq.

⁴¹ 42 Stat. 159, 168, 7 USCA 217, 221. *Morgan v. United States* (1936) 298 U. S. 468, 80 L. Ed. 1288, 56 S. Ct. 906; *Tagg Bros. & Moorhead v. United States* (1930) 280 U. S. 420, 74 L. Ed. 524, 50 S. Ct. 220; *Stafford v. Wallace* (1922) 258 U. S. 495, 66

L. Ed. 735, 42 S. Ct. 397, 23 A. L. R. 229.

⁴² 46 Stat. 531, 535, 7 USCA 499a et seq.

⁴³ 48 Stat. 211, 216, amended 49 Stat. 376. See note 37 supra.

⁴⁴ 48 Stat. 1064, 1093, amended 50 Stat. 189, 47 USCA 151. *Rochester Telephone Corp. v. United States* (1939) 307 U. S. 125, 83 L. Ed. 1147, 59 S. Ct. 754.

⁴⁵ *United States v. Griffin* (1938) 303 U. S. 226, 82 L. Ed. 764, 58 S. Ct. 601.

Cf. *Merchant Marine Act of 1936*, 49 Stat. 1985, 1987, 46 USCA 1114.

Cf. also the procedure for suits to enjoin the enforcement of state and federal statutes on the ground that they are unconstitutional, *Judicial Code* 266, 36 Stat. 557, 1162, amended 37 Stat. 1013, 43 Stat. 938, 28 USCA 380, and *Judiciary Act of 1937*, 50 Stat. 751, 752, 28 USCA 349a, 380a, *infra* §§ 672, 683, et seq.

⁴⁶ 16 USCA 791a et seq.

^{46a} 16 USCA 825f (b).

any party aggrieved by an order issued by the Commission in proceeding under the Act may obtain review of such order in the Circuit Court of Appeals. It is governed by the same constitutional principles as the Urgent Deficiencies Act.⁴⁷ The Act contemplates review of orders of definitive character.⁴⁸

A finding by the commission may not be reviewed in the Circuit Court of Appeals under the act even though it effects a determination of status and consequently affects legal rights,⁴⁹ but should be reviewable in the general equity jurisdiction of a one-judge district court.⁵⁰

2. Under the National Labor Relations Act

§ 645. In General.

An order of the National Labor Relations Board may be enforced only upon petition to a Circuit Court of Appeals or the Court of Appeals for the District of Columbia.⁵¹ A party aggrieved by an order of the Board may petition the same courts to modify or set aside the order in whole or in part.⁵² But this opportunity by private parties to contest an order is not an opportunity to enforce it.⁵³ In either case the Circuit Court of Appeals acquires jurisdiction only upon compliance with the requisites provided by statute,⁵⁴ while judicial review of action of the Board outside the provisions of the

⁴⁷ Federal Power Commission v. Pacific Power & Light Co. (1939) 307 U. S. 156, 83 L. Ed. 1180, 59 S. Ct. 766. The provisions in the Federal Power Act for judicial review are substantially similar to the bulk of the recently enacted provisions for judicial review.

⁴⁸ Federal Power Commission v. Metropolitan Edison Co. (1938) 304 U. S. 375, 82 L. Ed. 1408, 58 S. Ct. 963. See also § 195 et seq.

⁴⁹ Carolina Aluminum Co. v. Federal Power Commission (C. C. A. 4th, 1938) 97 F. (2d) 435.

⁵⁰ See American Federation of Labor v. National Labor Relations Board (1940) 308 U. S. 401, 84 L. Ed. 347, 60 S. Ct. 300; Utah Fuel Co. v. National Bituminous Coal Commission (1939) 306 U. S. 56, 83 L. Ed. 483, 59 S. Ct. 409; Shields v. Utah Idaho C.

R. Co. (1938) 305 U. S. 177, 83 L. Ed. 111, 59 S. Ct. 160. See § 650.

⁵¹ 29 USCA 160(e). Consolidated Edison Co. v. National Labor Relations Board (1938) 305 U. S. 197, 83 L. Ed. 126, 59 S. Ct. 206.

⁵² 29 USCA 160(f). National Labor Relations Board v. Newport News Shipbuilding & Dry Dock Co. (1939) 308 U. S. 241, 84 L. Ed. 219, 60 S. Ct. 203; Consolidated Edison Co. v. National Labor Relations Board (1938) 305 U. S. 197, 83 L. Ed. 126, 59 S. Ct. 206.

⁵³ Amalgamated Utility Workers v. Consolidated Edison Co. (1940) 309 U. S. 261, 84 L. Ed. 738, 60 S. Ct. 561.

⁵⁴ American Federation of Labor v. National Labor Relations Board (1940) 308 U. S. 401, 84 L. Ed. 347, 60 S. Ct. 300.

act may be obtained under the general equity jurisdiction of a federal district court, where a justiciable controversy exists.⁵⁵

§ 646. First Requisite: Outstanding Final Order.

A Court of Appeals can acquire no jurisdiction before the Board has made a final order which has not been set aside.⁵⁶ A contention that in seeking to vacate its order the Board did not intend to abandon it, but intended to "regularize" and reenter it, will be overruled as there is no occasion to speculate on the Board's future proceedings.⁵⁷ A party may not be aggrieved by the Board's mere attempt to retain jurisdiction.⁵⁸

Under the act an order is not final if it merely directs an election⁵⁹ or certifies a union as bargaining agent.⁶⁰

§ 647. Second Requisite: Filing of Transcript of Board Proceedings.

Even when a final order has been made jurisdiction of a Court of Appeals is not secured until a transcript of the administrative proceedings before the Board is filed in the court, following the filing of a petition to enforce or set aside the order.⁶¹ Jurisdiction is not

⁵⁵ See § 650 et seq.

⁵⁶ *National Labor Relations Board v. International Brotherhood of Electrical Workers* (1940) 308 U. S. 413, 84 L. Ed. 354, 60 S. Ct. 306; *American Federation of Labor v. National Labor Relations Board* (1940) 308 U. S. 401, 84 L. Ed. 347, 60 S. Ct. 300; *Matter of National Labor Relations Board* (1938) 304 U. S. 486, 82 L. Ed. 1482, 58 S. Ct. 1001; *Harris v. National Labor Relations Board* (C. C. A. 3d, 1938) 100 F. (2d) 197, cert. den. (1939) 306 U. S. 645, 83 L. Ed. 1044, 59 S. Ct. 584, rehearing denied 306 U. S. 669, 83 L. Ed. 1063, 59 S. Ct. 642. See also § 195 et seq.

⁵⁷ *Matter of National Labor Relations Board* (1938) 304 U. S. 486, 82 L. Ed. 1482, 58 S. Ct. 1001. See also § 755.

⁵⁸ *Matter of National Labor Relations Board* (1938) 304 U. S. 486, 82 L. Ed. 1482, 58 S. Ct. 1001.

⁵⁹ *National Labor Relations Board*

v. Falk Corp. (1940) 308 U. S. 453, 84 L. Ed. 396, 60 S. Ct. 307; *National Labor Relations Board v. International Brotherhood of Electrical Workers* (1940) 308 U. S. 413, 84 L. Ed. 354, 60 S. Ct. 306. See also *Ames Baldwin Wyoming Co. v. National Labor Relations Board* (C. C. A. 4th, 1934) 73 F. (2d) 489.

⁶⁰ *American Federation of Labor v. National Labor Relations Board* (1940) 308 U. S. 401, 84 L. Ed. 347, 60 S. Ct. 300; *United Employees Ass'n v. National Labor Relations Board* (C. C. A. 3d, 1938) 96 F. (2d) 875.

⁶¹ 29 USCA 160 (e). *Matter of National Labor Relations Board* (1938) 304 U. S. 486, 82 L. Ed. 1482, 58 S. Ct. 1001; *Harris v. National Labor Relations Board* (C. C. A. 3d, 1938) 100 F. (2d) 197, cert. den. (1939) 306 U. S. 645, 83 L. Ed. 1044, 59 S. Ct. 584, rehearing denied 306 U. S. 669, 83 L. Ed. 1063, 59 S. Ct. 642. See also *Hicks v. National*

obtained upon the mere filing of the petition to set aside,⁶² and at any time before the transcript is filed the Board may modify or set aside its order in whole or in part, just as a master in chancery may modify or recall his report to a court after submission but before action by the court.⁶³ The investiture of the court with jurisdiction to review the order on the merits only upon filing the transcript is not a denial of due process of law.⁶⁴ The question as to what relief a party should be entitled if the Board should refuse to fill a transcript, has been expressly left open.⁶⁵

Once the transcript of the proceedings before the Board has been filed in the particular Court of Appeals, the jurisdiction of that court becomes exclusive.⁶⁶

§ 648. Interlocutory Judicial Review.

Despite the foregoing, under section 10 (e) and (f) of the Act ⁶⁷ a party aggrieved by an examiner's refusal to hear evidence may apply to the Circuit Court of Appeals for leave to adduce the evidence. On such an application and a showing of reasonable grounds the court can order it to be taken. Indeed, a failure to use this available remedy precludes a later challenge on this ground, even where the refusal to hear evidence was clearly arbitrary, unreasonable, and an abuse of discretion.⁶⁸

3. Under the Securities Act and Related Statutes

§ 649. In General.

Final orders of the Securities and Exchange Commission under the various acts conferring its powers may be had in an appropriate Circuit Court of Appeals or the Court of Appeals for the District of

Labor Relations Board (C. C. A. 4th, 1939) 100 F. (2d) 804, cert. den. 308 U. S. 554, 84 L. Ed. 466, 60 S. Ct. 115.

⁶² Matter of National Labor Relations Board (1938) 304 U. S. 486, 82 L. Ed. 1482, 58 S. Ct. 1001.

⁶³ Matter of National Labor Relations Board (1938) 304 U. S. 486, 82 L. Ed. 1482, 58 S. Ct. 1001.

⁶⁴ Matter of National Labor Relations Board (1938) 304 U. S. 486, 82 L. Ed. 1482, 58 S. Ct. 1001.

⁶⁵ Matter of National Labor Rela-

tions Board (1938) 304 U. S. 486, 82 L. Ed. 1482, 58 S. Ct. 1001.

⁶⁶ Ford Motor Co. v. National Labor Relations Board (1938) 305 U. S. 364, 83 L. Ed. 221, 59 S. Ct. 301; Hicks v. National Labor Relations Board (C. C. A. 4th, 1939) 100 F. (2d) 804, cert. den. 308 U. S. 554, 84 L. Ed. 446, 60 S. Ct. 115.

⁶⁷ 29 USCA 160 (e) (f).

⁶⁸ Consolidated Edison Co. v. National Labor Relations Board (1938) 305 U. S. 197, 83 L. Ed. 126, 59 S. Ct. 206.

Columbia.^{68a} "Final" orders so reviewable do not include an order denying a motion to withdraw a registration statement,⁶⁹ but do include an order denying an application to treat as confidential information furnished to the Commission.⁷⁰ A provision for judicial review of orders of the Securities and Exchange Commission presupposes a proceeding before the Commission. Without having instituted such a proceeding a party may not obtain review of the Commission's action under the Act.⁷¹ Thus, where a carrier sent a letter to the Commission asking it to amend requirements as to filing annual financial statements by common carriers and a director of the Commission replied that he had been directed to advise the carrier that its petition was denied, the Circuit Court of Appeals was without jurisdiction to review the alleged "order," since there had been no proceeding within the statute.⁷²

However, where there is a justiciable controversy with the Commission, even though there be no outstanding "final" order, judicial review should be obtainable in a one-judge district court upon an appropriate showing. The fact that there may be no judicial review under a particular act, in a particular court, does not preclude all judicial review or invocation of the judicial power once a justiciable controversy is presented.⁷³

*C. Under the Equity Jurisdiction of Federal District Courts
Provided by General Statutes*

1. General Requisites of Federal Equity Jurisdiction

§ 650. General Equity Jurisdiction in Absence of Statutory Mode of Review.

Certain statutes provide for judicial review of particular administrative orders of certain agencies, in designated courts under speci-

^{68a} See the statutes in Appendix A relating to review of SEC orders.

⁶⁹ *Resources Corporation International v. Securities & Exchange Commission* (C. C. A. 7th, 1938) 97 F. (2d) 788.

⁷⁰ *American Sumatra Tobacco Corp. v. Securities & Exchange Commission* (1937) 68 App. D. C. 77, 93 F. (2d) 236.

⁷¹ *Third Ave. Ry. Co. v. Securities & Exchange Commission* (C. C. A. 2d, 1936) 85 F. (2d) 914.

⁷² *Third Ave. Ry. Co. v. Securities & Exchange Commission* (C. C. A. 2d, 1936) 85 F. (2d) 914.

⁷³ See *American Federation of Labor v. National Labor Relations Board* (1940) 308 U. S. 401, 84 L. Ed. 347, 60 S. Ct. 300; *Utah Fuel Co. v. National Bituminous Coal Commission* (1939) 306 U. S. 56, 83 L. Ed. 483, 59 S. Ct. 409; *Shields v. Utah Idaho C. R. Co.* (1938) 305 U. S. 177, 83 L. Ed. 111, 59 S. Ct. 160. See also § 650.

fied procedure. Under these statutory modes of review certain types of orders, and findings, are usually not reviewable, so that the statutory review has limited application to action of the particular agency. However, if a justiciable controversy is made out, judicial review of an order or finding of an administrative agency may be had under the general equity jurisdiction of a district court, if such order or finding is not reviewable under the Urgent Deficiencies Act,⁷⁴ the National Labor Relations Act,⁷⁵ the Bituminous Coal Act of 1937,⁷⁶ or other judicial review statute applicable to a particular agency.⁷⁷ The fact that the statutory mode of review is inapplicable cannot preclude judicial review in an appropriate court where a justiciable controversy is made out.⁷⁸ And the absence of statutory provisions for judicial review does not preclude judicial review under the equity jurisdiction of a district court.⁷⁹ In the absence of statutory provisions for judicial review, courts must exercise the judicial power to determine the legal validity of administrative action whenever it is in issue,⁸⁰ except where attack is collateral in the sense that it cannot be adequately defended by the agency which made the order.⁸¹

State administrative orders are reviewable under section 266 of the

⁷⁴ *Shannahan v. United States* (1938) 303 U. S. 596, 82 L. Ed. 1039, 58 S. Ct. 732; *United States v. Griffin* (1938) 303 U. S. 226, 82 L. Ed. 764, 58 S. Ct. 601; *Shields v. Utah Idaho C. R. Co.* (1938) 305 U. S. 177, 83 L. Ed. 111, 59 S. Ct. 160.

⁷⁵ *American Federation of Labor v. National Labor Relations Board* (1940) 308 U. S. 401, 84 L. Ed. 347, 60 S. Ct. 300; *American Federation of Labor v. Madden* (D. C. D. C., 1940) 33 F. Supp. 943.

⁷⁶ *Utah Fuel Co. v. National Bituminous Coal Commission* (1939) 306 U. S. 56, 83 L. Ed. 483, 59 S. Ct. 409.

⁷⁷ *Chastleton Corp. v. Sinclair* (1924) 264 U. S. 543, 68 L. Ed. 841, 44 S. Ct. 405 (Rent Commission of District of Columbia). See also § 187 et seq.

⁷⁸ *United States v. Griffin* (1938) 303 U. S. 226, 82 L. Ed. 764, 58 S. Ct. 601.

⁷⁹ See § 650.

Board of Tea Appeals.

21 USCA 41-50. *Waite v. Macy* (1918) 246 U. S. 606, 62 L. Ed. 892, 38 S. Ct. 395.

Postmaster-General.

Leach v. Carlile (1922) 258 U. S. 138, 66 L. Ed. 511, 42 S. Ct. 227; *American School of Magnetic Healing v. McAnnulty* (1902) 187 U. S. 94, 47 L. Ed. 90, 23 S. Ct. 33.

Secretary of the Interior.

Compare *Standard Oil Co. of California v. United States* (C. C. A. 9th, 1940) 107 F. (2d) 402, cert. den. 309 U. S. 654, 84 L. Ed. 1003, 60 S. Ct. 469.

⁸⁰ *David L. Moss Co. v. United States* (Ct. Cust. & Pat. App. 1939) 103 F. (2d) 395.

⁸¹ See *State of New York v. United States* (1922) 257 U. S. 591, 66 L. Ed. 385, 42 S. Ct. 239.

Judicial Code⁸² and under the general equity jurisdiction of a one-judge district court.⁸³

§ 651. Equity Character of District Court Same Whether One or Three Judges Sit.

A suit to set aside an order of a state agency may be brought in a federal district court before a single judge in the exercise of its general equity jurisdiction, in a case where section 266 of the Judicial Code does not apply either because the administrative action assailed is local only,⁸⁴ or because no interlocutory injunction is sought.⁸⁵ Yet such a suit may be brought in a three-judge district court convened pursuant to section 266 of the Judicial Code⁸⁶ if an interlocutory injunction is sought, and if the administrative action involved is held to be state rather than municipal or local action.⁸⁷ But whether a single judge sits, or three judges convened pursuant to section 266 of the Judicial Code, the Act of 1937, 28 USCA 380a,⁸⁸ or the Urgent Deficiencies Act,⁸⁹ equivalent requisites of federal equity jurisdiction apply.⁹⁰

§ 652. Orthodox Requisites of Federal Equity Jurisdiction: Raising Jurisdictional Questions.

Where no specific mode of review is provided by statute, the jurisdiction of the federal equity courts may only be obtained through orthodox methods, i. e., jurisdictional amount, federal question, lack of adequate remedy at law, inapplicability of the Johnson Act, etc.⁹¹ If it appears to the satisfaction of the district court, at any time after

⁸² See § 672 et seq.

⁸³ See *Wichita Railroad & Light Co. v. Public Utilities Commission* (1922) 260 U. S. 48, 67 L. Ed. 124, 43 S. Ct. 51.

⁸⁴ *Rorick v. Board of Com'rs of Everglades Drainage Dist.* (1939) 307 U. S. 208, 83 L. Ed. 1242, 59 S. Ct. 808. See *City of El Paso v. Texas Cities Gas Co.* (C. C. A. 5th, 1938) 100 F. (2d) 501, cert. den. (1939) 306 U. S. 650, 83 L. Ed. 1049, 59 S. Ct. 592, rehearing denied 306 U. S. 669, 83 L. Ed. 1063, 59 S. Ct. 643.

⁸⁵ *McCart v. Indianapolis Water Co.* (1938) 302 U. S. 419, 82 L. Ed. 336, 58 S. Ct. 324.

⁸⁶ 28 USCA 380.

⁸⁷ See § 672 et seq.

⁸⁸ See § 683 et seq.

⁸⁹ See § 633 et seq.

⁹⁰ *Ex parte Poresky* (1933) 290 U. S. 30, 78 L. Ed. 152, 54 S. Ct. 3; *Stratton v. St. Louis Southwestern R. Co.* (1932) 284 U. S. 530, 76 L. Ed. 465, 52 S. Ct. 222; *Matthews v. Rodgers* (1932) 284 U. S. 521, 76 L. Ed. 447, 52 S. Ct. 217; *Lawrence v. St. Louis-San Francisco R. Co.* (1927) 274 U. S. 588, 71 L. Ed. 1219, 47 S. Ct. 720; *Central Kentucky Natural Gas Co. v. Railroad Commission of Kentucky* (D. C. E. D. Ky., 1930) 37 F. (2d) 938.

⁹¹ See *Wichita Railroad & Light Co. v. Public Utilities Commission* (1922) 260 U. S. 48, 67 L. Ed. 124, 43 S. Ct. 51.

suit is brought, that it does not have jurisdiction it must dismiss the suit.⁹² If the want of equity jurisdiction is obvious, the objection may and should be raised by either trial or appellate court, *sua sponte*.⁹³ The objection that jurisdiction to entertain the suit does not exist may also be taken by answer.⁹⁴

§ 653. Jurisdiction of Suits to Enjoin State Judicial Proceedings.

Federal courts have no jurisdiction of a suit to enjoin state judicial proceedings, save in bankruptcy cases, because of the prohibition contained in section 265 of the Judicial Code.⁹⁵ Hence an attempt to obtain federal judicial review of a state administrative order by suing to enjoin a state suit between private parties involving the order, will fail. It is immaterial that the injunction restrains the parties and is not formally directed against the state court itself.⁹⁶ But this prohibition secures only the right of the state courts to exert their judicial power.⁹⁷ It does not apply to proceedings of state courts which are administrative, that is, legislative in character, the line between judicial and legislative character being definitely drawn. Hence the federal courts have jurisdiction of a suit to enjoin legislative proceedings of a state court.⁹⁸ When the requisites of federal

⁹² Judicial Code § 37, 28 USCA 80. *North Pacific S. S. Co. v. Soley* (1921) 257 U. S. 216, 66 L. Ed. 203, 42 S. Ct. 87.

⁹³ **Federal Trade Commission.**

Federal Trade Commission v. Claire Furnace Co. (1927) 274 U. S. 160, 71 L. Ed. 978, 47 S. Ct. 553.

State Agencies.

Petroleum Exploration v. Public Service Commission (1938) 304 U. S. 209, 82 L. Ed. 1204, 58 S. Ct. 834; *Matthews v. Rodgers* (1932) 284 U. S. 521, 76 L. Ed. 447, 52 S. Ct. 217.

⁹⁴ *North Pacific S. S. Co. v. Soley* (1921) 257 U. S. 216, 66 L. Ed. 203, 42 S. Ct. 87.

⁹⁵ 28 USCA, "§ 379. (Judicial Code, section 265.) Injunctions; stay in State courts. The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a State, except in cases where such injunction may be authorized by any law relat-

ing to proceedings in bankruptcy. (R. S. § 720; Mar. 3, 1911, c. 231, § 265, 36 Stat. 1162.)"

⁹⁶ *Oklahoma Packing Co. v. Oklahoma Gas & Electric Co.* (1940) 309 U. S. 4, 84 L. Ed. 537, 60 S. Ct. 215, rehearings denied 308 U. S. 530, 84 L. Ed. 447, 60 S. Ct. 215, 309 U. S. 693, 84 L. Ed. 1034, 60 S. Ct. 465; *Hill v. Martin* (1935) 296 U. S. 393, 80 L. Ed. 293, 56 S. Ct. 278.

⁹⁷ *Public Service Co. v. Corboy* (1919) 250 U. S. 153, 63 L. Ed. 905, 39 S. Ct. 440.

⁹⁸ *Hill v. Martin* (1935) 296 U. S. 393, 80 L. Ed. 293, 56 S. Ct. 278; *Public Service Co. v. Corboy* (1919) 250 U. S. 153, 63 L. Ed. 905, 39 S. Ct. 440; *Mississippi Railroad Commission v. Illinois Cent. R. Co.* (1906) 203 U. S. 335, 51 L. Ed. 209, 27 S. Ct. 90; *Lehigh Valley R. Co. of New Jersey v. Martin* (D. C. D. N. J., 1936) 19 F. Supp. 63.

equity jurisdiction are established the federal court takes cognizance of a case involving state legislative power and its proper exercise not on the basis of comity or discretion but from duty.⁹⁹

§ 654. Jurisdiction of Suits to Restrain State Administrative Officers.

The federal district courts have jurisdiction of a suit to restrain state officers from executing an unconstitutional statute,¹ or to restrain a state administrative agency from acting in violation of constitutional rights under color of a constitutional statute.²

⁹⁹ *Willcox v. Consolidated Gas Co.* (1909) 212 U. S. 19, 53 L. Ed. 382, 29 S. Ct. 192.

¹ *Ex parte La Prade* (1933) 289 U. S. 444, 77 L. Ed. 1311, 53 S. Ct. 682; *Public Service Co. v. Corboy* (1919) 250 U. S. 153, 63 L. Ed. 905, 39 S. Ct. 440; *Greene v. Louisville & I. R. Co.* (1917) 244 U. S. 499, 61 L. Ed. 1280, 37 S. Ct. 673; **Ex parte Young* (1908) 209 U. S. 123, 52 L. Ed. 714, 28 S. Ct. 441; *Mississippi Railroad Commission v. Illinois Cent. R. Co.* (1906) 203 U. S. 335, 51 L. Ed. 209, 27 S. Ct. 90.

"The answer to all this is the same as made in every case where an official claims to be acting under the authority of the State. The act to be enforced is alleged to be unconstitutional, and if it be so, the use of the name of the State to enforce an unconstitutional act to the injury of complainants is a proceeding without the authority of and one which does not affect the State in its sovereign or governmental capacity. It is simply an illegal act upon the part of a state official in attempting by the use of the name of the State to enforce a legislative enactment which is void because unconstitutional. If the act which the state Attorney General seeks to enforce be a violation of the Federal Constitution, the officer in proceeding under such enactment comes into conflict with the

superior authority of that Constitution, and he is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct. The State has no power to impart to him any immunity from responsibility to the supreme authority of the United States. See *In re Ayers*, supra, page 507. It would be an injury to complainant to harass it with a multiplicity of suits or litigation generally in an endeavor to enforce penalties under an unconstitutional enactment, and to prevent it ought to be within the jurisdiction of a court of equity. If the question of unconstitutionality with reference, at least, to the Federal Constitution be first raised in a Federal court that court, as we think is shown by the authorities cited hereafter, has the right to decide it to the exclusion of all other courts." (Mr. Justice Peckham in *Ex parte Young* (1908) 209 U. S. 123, 159, 160, 52 L. Ed. 714, 28 S. Ct. 441.)

² *Greene v. Louisville & I. R. Co.* (1917) 244 U. S. 499, 61 L. Ed. 1280, 37 S. Ct. 673; *McNeill v. Southern R. Co.* (1906) 202 U. S. 543, 50 L. Ed. 1142, 26 S. Ct. 722; *Smyth v. Ames* (1898) 169 U. S. 466, 42 L. Ed. 819, 18 S. Ct. 418; *Central Kentucky Natural Gas Co. v. Railroad Commission of Kentucky* (D. C. E. D. Ky., 1930) 37 F. (2d) 938.

§ 655. — State Statute Prohibiting Stay of Administrative Action Ineffective in Federal Courts.

A state statute forbidding a stay of proceedings until a final state judicial decree is rendered cannot prevent a federal equity court from affording such temporary relief by injunction as the principles of equity procedure require;³ and where a state statute prohibits a stay pending legislative or administrative review, so that a federal court takes jurisdiction to enjoin daily confiscation despite the absence of exhaustion of administrative remedies, the complainant can rely on the presumption of the statute's validity. Where his constitutional rights are being invaded and a state statute denies such stay, he is not required to establish that the statute is not invalid under the State Constitution.⁴

§ 656. General Jurisdictional Requisites.

The federal district courts have jurisdiction of all suits of a civil nature, at common law or in equity, brought by the United States, or by any officer thereof authorized by law to sue; or, where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of \$3000, and (a) arises under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, or (b) is between citizens of different states, or citizens of the District of Columbia, the Territory of Hawaii, or Alaska, and any state or territory, or (c) is between citizens of a state and foreign states, citizens or subjects.⁵ Matter in controversy and diversity of citizenship need not be present if the complainant establishes that his personal rights under the Constitution have been violated.⁶

§ 657. First Requisite: Matter in Controversy.

The matter in controversy must be shown clearly. This means that the complainant must specify the respects in which he will be injured by the order. He does not come within the court's jurisdiction simply because the order is invalid.⁷ If, at any time after suit is brought,

³ *Pacific Telephone & Telegraph Co. v. Kuykendall* (1924) 265 U. S. 196, 68 L. Ed. 975, 44 S. Ct. 553; *Home Telephone & Telegraph Co. v. Kuykendall* (1924) 265 U. S. 206, 68 L. Ed. 982, 44 S. Ct. 557.

⁴ *Pacific Telephone & Telegraph Co. v. Kuykendall* (1924) 265 U. S. 196, 68 L. Ed. 975, 44 S. Ct. 553; *Home Telephone & Telegraph Co. v. Kuy-*

kendall (1924) 265 U. S. 206, 68 L. Ed. 982, 44 S. Ct. 557.

⁵ 28 USCA 41 (1).

⁶ *Sweeney v. Pennsylvania Department of Public Assistance Board* (D. C. M. D. Pa., 1940) 33 F. Supp. 587.

⁷ *United Fuel Gas Co. v. Railroad Commission* (1929) 278 U. S. 300, 73 L. Ed. 390, 49 S. Ct. 150.

it appears to the court that the suit does not involve the jurisdictional amount, it is the duty of the court to dismiss the suit, whether the parties raise the question or not.⁸

In suits to enjoin enforcement of an administrative order or regulation the amount in controversy is the value of the right to be free from the order or regulation, and is measured by the loss, if any, which would follow enforcement of the order or regulation,⁹ such as cost of compliance therewith.¹⁰ Thus where the order or regulation is restrictive of the free operation of a business, the matter in controversy is the value to complainant of the right to conduct his business free of the restrictions.¹¹ The amount in controversy may not be the value or net worth of the business involved, unless the regulation or order sought to be imposed by administrative order would destroy the entire business. This cannot be the case where the order seeks to fix prices for a period of one year only.¹² In a suit by a carrier to enjoin the enforcement of an order of a state commission to establish and operate an industrial spur track, the plaintiff seeks relief not only from the burden of construction but from that of operation. Hence the amount involved includes not only the cost of construction, but interest thereon, depreciation, maintenance, and operating expenses, capitalized at a reasonable rate. Where such items come, for instance, to \$200 a year, this figure, capitalized at a reasonable rate, exceeds \$3000.¹³ The jurisdictional amount is not present where it appears that a state compensation commission ordered payments of \$11.25 a

⁸ Judicial Code § 37, 28 USCA 80. *North Pacific S. S. Co. v. Soley* (1921) 257 U. S. 216, 66 L. Ed. 203, 42 S. Ct. 87.

⁹ *Secretary of Agriculture.*

But see *Brandenburg v. Doyle* (D. C. S. D. Ill., S. Div., 1935) 12 F. Supp. 342.

State Agencies.

Petroleum Exploration v. Public Service Commission (1938) 304 U. S. 209, 82 L. Ed. 1294, 58 S. Ct. 834; *Kroger Grocery & Baking Co. v. Lutz* (1936) 299 U. S. 300, 81 L. Ed. 251, 57 S. Ct. 215; *Western & A. R. Co. v. Railroad Commission* (1923) 261 U. S. 264, 67 L. Ed. 645, 43 S. Ct. 252; *Snively Groves v. Florida Citrus Commission* (D. C. N. D. Fla., Gainesville Div., 1938) 23 F. Supp. 600; *Grandin*

Farmers' Co-operative Elevator Co. v. Langer (D. C. N. D., S. W. Div., 1934) 5 F. Supp. 425, aff'd per curiam 292 U. S. 605, 78 L. Ed. 1467, 54 S. Ct. 772.

¹⁰ *Petroleum Exploration v. Public Service Commission* (1938) 304 U. S. 209, 82 L. Ed. 1294, 58 S. Ct. 834.

¹¹ *Grandin Farmers' Co-operative Elevator Co. v. Langer* (D. C. N. D. S. W. Div., 1934) 5 F. Supp. 425, aff'd per curiam 292 U. S. 605, 78 L. Ed. 1467, 54 S. Ct. 772.

¹² *Kroger Grocery & Baking Co. v. Lutz* (1936) 299 U. S. 300, 81 L. Ed. 251, 57 S. Ct. 215.

¹³ *Western & A. R. Co. v. Railroad Commission* (1923) 261 U. S. 264, 67 L. Ed. 645, 43 S. Ct. 252.

week for 240 weeks, or until further order; but that the patient was cured and an order terminating disability had been made eight days before suit was brought, so that total expenses were \$1370.75, despite the fact that payments for the full 240 weeks would have amounted to \$3700.¹⁴ In a suit to enjoin collection of a tax on an allegedly discriminatory assessment, to the amount of the tax may be added the amount of penalties due for non-payment, to meet the requisite jurisdictional amount.¹⁵

Matter in controversy may of course be irreparable injury.¹⁶ Where a state statute provided heavy penalties day by day for failure to comply with an agency's order, which would amount to many thousands of dollars in a very short time, the jurisdictional amount was involved.¹⁷

§ 658. Second Requisite: Federal Question or Diversity of Citizenship.

§ 659. — Federal Question: Must Be Substantial.

Where a substantial federal question is raised, as by a claim that rates are confiscatory, there is federal jurisdiction irrespective of the parties' citizenship.¹⁸ But when a federal question is relied upon, it must be substantial,¹⁹ and if it is not, the bill of complaint will be dismissed for lack of jurisdiction.²⁰

§ 660. — Extends Jurisdiction to All Issues.

Where the bill of complaint presents a real and substantial controversy under the Federal Constitution which confers jurisdiction on the federal court irrespective of the citizenship of the parties, the jurisdiction of the district court, and on appeal, of the Supreme Court, extends to the determination of all questions involved in the

¹⁴ *North Pacific S. S. Co. v. Soley* (1921) 257 U. S. 216, 66 L. Ed. 203, 42 S. Ct. 87.

¹⁵ *Kansas City Southern Ry. Co. v. Ogden Levee Dist.* (C. C. A. 8th, 1926) 15 F. (2d) 637.

¹⁶ See § 664.

¹⁷ *Mountain States Telephone & Telegraph Co. v. Public Utilities Commission* (D. C. D. Utah, Cent. Div., 1934) 8 F. Supp. 307.

¹⁸ *Central Kentucky Natural Gas*

Co. v. Railroad Commission of Kentucky (D. C. E. D. Ky., 1930) 37 F. (2d) 938; *Brand v. Pennsylvania R. Co.* (D. C. E. D. Pa., 1938) 22 F. Supp. 569.

¹⁹ *Louisville & N. R. Co. v. Garrett* (1913) 231 U. S. 298, 58 L. Ed. 229, 34 S. Ct. 48.

²⁰ *Humboldt Lovelock Irrigation Light & Power Co. v. Smith* (D. C. D. Nev., 1938) 25 F. Supp. 571.

case, including questions of state law, regardless of the disposition of the federal question or whether it be found necessary to decide it at all.²¹ A similar rule governs the application for an injunction under section 266 of the Judicial Code. Local questions are before the lower court, and the appeal brings them to the Supreme Court.²² Thus, where the bill of complaint presents a case for federal equity jurisdiction, and administrative discrimination by state taxing officials is shown to exist in violation of state law, the federal court may grant relief by injunction based on the violation of state law without deciding the federal constitutional question upon which jurisdiction of the court rests.²³

§ 661. — What Are Federal Questions.

Federal questions, those arising under the Constitution or laws of the United States or treaties made, constitute the usual ground invoked in appealing to a district court's general equity jurisdiction for relief from administrative action. The usual complaint is violation of a constitutional right, such as denial of due process of law.²⁴ If a state statute should deprive a party of an adequate remedy for enforcement of his rights, he may be denied due process of law in violation of the Fourteenth Amendment.²⁵ However, a party is not deprived of an adequate remedy for enforcement of his rights by a state statute which provides for administrative action regulating distribution of water in arid lands, where the statute provides for an adequate review in the state courts of any administrative action taken.²⁶ In such a case, no substantial federal question is presented.²⁷

§ 662. — Diversity of Citizenship.

Federal administrative agencies such as the Railway Labor Board and the Interstate Commerce Commission are not citizens of any state

²¹ *Bohler v. Callaway* (1925) 267 U. S. 479, 69 L. Ed. 745, 45 S. Ct. 431; *Greene v. Louisville & I. R. Co.* (1917) 244 U. S. 499, 61 L. Ed. 1280, 37 S. Ct. 673; *Louisville & N. R. Co. v. Finn* (1915) 235 U. S. 601, 59 L. Ed. 379, 35 S. Ct. 146; *Louisville & N. R. Co. v. Garrett* (1913) 231 U. S. 298, 58 L. Ed. 229, 34 S. Ct. 48.

²² *Louisville & N. R. Co. v. Garrett* (1913) 231 U. S. 298, 58 L. Ed. 229, 34 S. Ct. 48.

²³ *Bohler v. Callaway* (1925) 267 U. S. 479, 69 L. Ed. 745, 45 S. Ct. 431.

²⁴ See *Mayo v. Lakeland Highlands Canning Co.* (1940) 309 U. S. 310, 84 L. Ed. 774, 60 S. Ct. 517. See also § 262 et seq.

²⁵ See *Humboldt Lovelock Irrigation Light & Power Co. v. Smith* (D. C. D. Nev., 1938) 25 F. Supp. 571.

²⁶ *Humboldt Lovelock Irrigation Light & Power Co. v. Smith* (D. C. D. Nev., 1938) 25 F. Supp. 571.

²⁷ *Humboldt Lovelock Irrigation Light & Power Co. v. Smith* (D. C. D. Nev., 1938) 25 F. Supp. 571.

for the purpose of acquiring jurisdiction over them on the ground of diversity of citizenship.²⁸ But there is diversity of citizenship in a suit by a utility which is operating in state A although incorporated in state B, against an administrative agency of state A.²⁹

§ 663. Third Requisite: Ground of Equity Jurisdiction: Acts or Threats Essential.

For resort to the equity side of a federal district court a specific ground of equity jurisdiction is essential in addition to the statutory requisites of general federal jurisdiction just discussed. Thus it must appear that administrative action would cause irreparable injury, or that there are other special circumstances bringing the case under some recognized head of equity jurisdiction.³⁰ So far as administrative action is concerned, there can be no right to resort to equity unless there has been action, or a threat of action, by the agency. Neither the utterances, nor the processes of reasoning of an agency, as distinguished from its acts, are a subject for injunction under the general equity powers.³¹ There is no right to resort to equity merely because of anticipation of improper or invalid administrative action.³²

§ 664. — Irreparable Injury.

A most appropriate ground of equity jurisdiction exists where allegations or proof establish that the complaining party will be irreparably injured unless he can obtain equitable relief.³³ No in-

²⁸ *Texas v. Interstate Commerce Commission* (1922) 258 U. S. 158, 66 L. Ed. 531, 42 S. Ct. 261.

²⁹ *Wichita Railroad & Light Co. v. Public Utilities Commission* (1922) 260 U. S. 48, 67 L. Ed. 124, 43 S. Ct. 51.

³⁰ *Henrietta Mills v. Rutherford County* (1930) 281 U. S. 121, 74 L. Ed. 737, 50 S. Ct. 270.

³¹ *United States v. Los Angeles & S. L. R. Co.* (1927) 273 U. S. 299, 71 L. Ed. 651, 47 S. Ct. 413.

³² *Board of Tea Appeals.*

Waite v. Macy (1918) 246 U. S. 606, 62 L. Ed. 892, 38 S. Ct. 395.
National Labor Relations Board.

E. I. Dupont de Nemours & Co. v. Boland (C. C. A. 2d, 1936) 85 F. (2d) 12; *Redlands Foothill Groves v. Jacobs* (D. C. S. D. Cal., Cent. Div., 1940) 30 F. Supp. 995.

State Agencies.

Continental Baking Co. v. Woodring (1932) 286 U. S. 352, 76 L. Ed. 1155, 52 S. Ct. 595, 81 A. L. R. 1402; *Lawrence v. St. Louis-San Francisco R. Co.* (1927) 274 U. S. 588, 71 L. Ed. 1219, 47 S. Ct. 720.

³³ *National Labor Relations Board.*

See E. I. Dupont de Nemours & Co. v. Boland (C. C. A. 2d, 1936) 85 F. (2d) 12; *American Federation of Labor v. Madden* (D. C. D. C., 1940) 33 F. Supp. 943.

National Bituminous Coal Commission.

See Utah Fuel Co. v. National Bituminous Coal Commission (1939) 306 U. S. 56, 83 L. Ed. 483, 59 S. Ct. 409.

Secretary of the Interior.

Ickes v. Fox (1937) 300 U. S. 82, 81 L. Ed. 525, 57 S. Ct. 412, rehear-

junction should ordinarily be granted unless it is necessary to protect rights against injuries otherwise irremediable.³⁴ A showing of irreparable injury is essential to the obtaining of a temporary restraining order under section 266 of the Judicial Code.³⁵

§ 665. — — What Constitutes Irreparable Injury.

A party may be irreparably injured by disclosure of information demanded by an administrative agency.³⁶ Where a state tax, unlawfully assessed, is made a first lien upon all the property of a railroad in the state and thus puts a cloud upon its title, and delay in payment is visited with considerable penalties, irreparable injury is threatened.³⁷ Where a statute provides that any violation of any administrative order under a given section shall be punished by a fine of \$1000, six months' imprisonment, or both, these penalties attach to each violation, and hence irreparable injury may be suffered in a proper case.³⁸ If confiscation is the only injury complained of in a suit to enjoin an administrative order, it must be shown by proper allegations or no ground of equity jurisdiction is made out.³⁹

A final valuation, not acted upon, of the Interstate Commerce Commission, which is not reviewable under the Urgent Deficiencies Act⁴⁰ is ordinarily not reviewable under the general equity power.⁴¹ Neither the argument that the report will, unless suppressed, injure the credit of the carrier with the public,⁴² nor the argument that the

ing denied 300 U. S. 886, 81 L. Ed. 888, 57 S. Ct. 504.
State Agencies.

* *Henrietta Mills v. Rutherford County* (1930) 281 U. S. 121, 74 L. Ed. 737, 50 S. Ct. 270; *United Fuel Gas Co. v. Railroad Commission* (1929) 278 U. S. 300, 73 L. Ed. 390, 49 S. Ct. 150; * *Lawrence v. St. Louis-San Francisco R. Co.* (1927) 274 U. S. 588, 71 L. Ed. 1219, 47 S. Ct. 720; *Herkness v. Irion* (1928) 278 U. S. 92, 73 L. Ed. 198, 49 S. Ct. 40.

³⁴ *State Corporation Commission v. Wichita Gas Co.* (1934) 290 U. S. 561, 78 L. Ed. 500, 54 S. Ct. 321; *Lawrence v. St. Louis-San Francisco R. Co.* (1927) 274 U. S. 588, 71 L. Ed. 1219, 47 S. Ct. 720; *Sunshine Broadcasting Co. v. Fly* (D. C. D. C., 1940) 33 F. Supp. 560 (FCC).

³⁵ See § 672 et seq.

³⁶ *Utah Fuel Co. v. National Bituminous Coal Commission* (1939) 306 U. S. 56, 83 L. Ed. 483, 59 S. Ct. 409.

³⁷ *Wallace v. Hines* (1920) 253 U. S. 66, 64 L. Ed. 782, 40 S. Ct. 435.

³⁸ *Panama Refining Co. v. Ryan* (1935) 293 U. S. 388, 79 L. Ed. 446, 55 S. Ct. 241.

³⁹ *United Fuel Gas Co. v. Railroad Commission* (1929) 278 U. S. 300, 73 L. Ed. 390, 49 S. Ct. 150.

⁴⁰ *United States v. Los Angeles & S. L. R. Co.* (1927) 273 U. S. 299, 71 L. Ed. 651, 47 S. Ct. 413. See also § 633 et seq.

⁴¹ *United States v. Los Angeles & S. L. R. Co.* (1927) 273 U. S. 299, 71 L. Ed. 651, 47 S. Ct. 413.

⁴² *United States v. Los Angeles & S. L. R. Co.* (1927) 273 U. S. 299, 71 L. Ed. 651, 47 S. Ct. 413.

commission may be misled into illegal action in using the valuation as the basis of action, is persuasive.⁴³

One is not irreparably injured, in the equitable sense, by the cost of preparing for, and going through, a rate hearing where the expense is not disproportionate to the utility's business.⁴⁴ No way has been discovered of relieving a defendant from the necessity of a trial to establish that an administrative complaint is groundless. Such is part of the social burden of living under government.⁴⁵ Similarly where the expense of complying with administrative regulations until there is a court decision on them is trifling, or where there is mere inconvenience in raising money to pay a tax, and a six-month delay before the tax may be recovered if illegal, such delay being the common incident of practically every contest over the validity of a federal tax, there is no irreparable injury.⁴⁶

In considering whether an adequate showing of irreparable injury has been made, the damage possible to the defendant by issuance of an injunction must also be considered.⁴⁷

§ 666. — Avoidance of Multiplicity of Suits.

Avoidance of multiplicity of suits provides a ground for equity jurisdiction.⁴⁸ This ground is limited to cases where there would otherwise be some necessity for the maintenance of numerous suits between the same parties involving the same issues of law or fact. It does not extend to cases where there are numerous parties plaintiff or

⁴³ *United States v. Los Angeles & S. L. R. Co.* (1927) 273 U. S. 299, 71 L. Ed. 651, 47 S. Ct. 413.

⁴⁴ *Petroleum Exploration v. Public Service Commission* (1938) 304 U. S. 209, 82 L. Ed. 1294, 58 S. Ct. 834.

⁴⁵ *Petroleum Exploration v. Public Service Commission* (1938) 304 U. S. 209, 82 L. Ed. 1294, 58 S. Ct. 834; *Myers v. Bethlehem Shipbuilding Corp.* (1938) 303 U. S. 41, 82 L. Ed. 638, 58 S. Ct. 459.

⁴⁶ *California v. Latimer* (1938) 305 U. S. 255, 83 L. Ed. 159, 59 S. Ct. 166.

⁴⁷ *Lawrence v. St. Louis-San Francisco R. Co.* (1927) 274 U. S. 588, 71 L. Ed. 1219, 47 S. Ct. 720.

⁴⁸ *Interstate Commerce Commission. Baltimore & O. R. Co. v. United*

States (1929) 279 U. S. 781, 73 L. Ed. 954, 49 S. Ct. 492.

Rent Commission (District of Columbia).

Gilbert v. Sargent (1927) 57 App. D. C. 207, 19 F. (2d) 681.

State Agencies.

Hegeman Farms Corporation v. Baldwin (D. C. S. D. N. Y., 1934) 6 F. Supp. 297, aff'd 293 U. S. 163, 79 L. Ed. 259, 55 S. Ct. 7; *Matthews v. Rodgers* (1932) 284 U. S. 521, 76 L. Ed. 447, 52 S. Ct. 217; *Wilson v. Illinois Southern R. Co.* (1924) 263 U. S. 574, 68 L. Ed. 456, 44 S. Ct. 203; *Greene v. Louisville & I. R. Co.* (1917) 244 U. S. 499, 61 L. Ed. 1280, 37 S. Ct. 673.

defendant, and the issues between them and the adverse party are not necessarily identical.⁴⁹

§ 667. — Fraud on Constitutional Rights.

Although a federal court will not entertain a bill to enjoin the collection of state taxes where there is an adequate legal remedy to recover them, and the assessment is attacked on the sole ground that it is illegal,⁵⁰ when a taxpayer alleges in the federal court not only that a state assessment is unwarranted by law, but that the manner of making it amounted to a fraud upon his constitutional rights, or such gross mistake as would amount to a fraud, a distinct and well recognized ground of equity jurisdiction is averred.⁵¹ A continuing violation of legal rights, after injunction against the violation has been granted, may afford a ground for equitable relief.⁵²

§ 668. Limitation on Equity Jurisdiction: There Must Be No Adequate Remedy at Law.

It is specifically provided by statute that suits in equity shall not be sustained in any court of the United States in any case where a plain, adequate and complete remedy may be had at law.⁵³ Where state administrative action is assailed in a federal district court, a state legal remedy must be adequate under the standards of the federal courts in order for there to be an adequate remedy at law. In determining what is a legal remedy and its adequacy to defeat their equity jurisdiction, the federal courts are guided by the historic distinction between law and equity in those courts, not by the name given to remedies or the distinctions made between them by state practice.⁵⁴ The adequacy of a remedy at law must be clear; if the

⁴⁹ *Matthews v. Rodgers* (1932) 284 U. S. 521, 76 L. Ed. 447, 52 S. Ct. 217.

⁵⁰ *Johnson v. Wells Fargo & Co.* (1915) 239 U. S. 234, 60 L. Ed. 243, 36 S. Ct. 62.

⁵¹ *Johnson v. Wells Fargo & Co.* (1915) 239 U. S. 234, 60 L. Ed. 243, 36 S. Ct. 62. See also § 401 et seq.

⁵² *Johnson v. Wells Fargo & Co.* (1915) 239 U. S. 234, 60 L. Ed. 243, 36 S. Ct. 62.

⁵³ Judicial Code § 267, 28 USCA 384, continuing the Judiciary Act of 1789, 1 Stat. 82.

Henrietta Mills v. Rutherford

County (1930) 281 U. S. 121, 74 L. Ed. 737, 50 S. Ct. 270; *Waite v. Macy* (1918) 246 U. S. 606, 62 L. Ed. 892, 38 S. Ct. 395; *Beman v. Bendix Products Corp.* (C. C. A. 7th, 1937) 89 F. (2d) 661; *Western Union Telegraph Co. v. Tax Commission of Ohio* (D. C. S. D. Ohio, E. Div., 1927) 21 F. (2d) 355.

⁵⁴ *Stratton v. St. Louis Southwestern R. Co.* (1932) 284 U. S. 530, 76 L. Ed. 465, 52 S. Ct. 222; *Matthews v. Rodgers* (1932) 284 U. S. 521, 76 L. Ed. 447, 52 S. Ct. 217; *Catholic Society of Religious and Literary Education*

remedy is doubtful, equitable relief may be had.⁵⁵ Yet the mere fact that a suit in equity is a more convenient test than an action at law does not justify resort to the former.⁵⁶

This rule is to be contrasted, where state administrative remedies are concerned, with the rule requiring exhaustion of administrative, that is, legislative remedies, as a prerequisite to judicial review, and its corollary that state judicial remedies need not be exhausted as a prerequisite to judicial review.⁵⁷ While state judicial remedies need not be exhausted as such a prerequisite, a federal equity court does not have jurisdiction of a suit for judicial review, where the state judicial remedy is an adequate remedy at law by federal standards.⁵⁸

There is no equity in a bill brought to enjoin a collection of a tax alleged to have been discriminatorily assessed where state administrative remedies have not been exhausted.⁵⁹

§ 669. — What Constitutes an Adequate Remedy at Law.

A special statutory method of judicial review provides an adequate remedy at law where it affords full opportunity to contest the validity

v. Madison County (C. C. A. 4th, 1935) 74 F. (2d) 848; Southern Ry. Co. v. Query (D. C. E. D. S. C., 1927) 21 F. (2d) 333.

"The adequacy or inadequacy of a remedy at law for the protection of the rights of one entitled upon any ground to invoke the powers of a Federal court, is not to be conclusively determined by the statutes of the particular State in which suit may be brought. One who is entitled to sue in the Federal Circuit Court may invoke its jurisdiction in equity whenever the established principles and rules of equity permit such a suit in that court; and he cannot be deprived of that right by reason of his being allowed to sue at law in a state court on the same cause of action." (Mr. Justice Harlan in *Smyth v. Ames* (1898) 169 U. S. 466, 516, 42 L. Ed. 819, 18 S. Ct. 418.)

⁵⁵ *Bohler v. Callaway* (1925) 267 U. S. 479, 69 L. Ed. 745, 45 S. Ct. 431; *Wilson v. Illinois Southern R. Co.* (1924) 263 U. S. 574, 68 L. Ed. 456, 44 S. Ct. 203; *Union Pac. R. Co. v.*

Board of Com'rs of Weld County (1918) 247 U. S. 282, 62 L. Ed. 1110, 38 S. Ct. 510. See *Grandin Farmers' Co-operative Elevator Co. v. Langer* (D. C. N. D., S. W. Div., 1934) 5 F. Supp. 425, aff'd per curiam 292 U. S. 605, 78 L. Ed. 1467, 54 S. Ct. 772.

⁵⁶ *Henrietta Mills v. Rutherford County* (1930) 281 U. S. 121, 74 L. Ed. 737, 50 S. Ct. 270.

⁵⁷ See *Bohler v. Callaway* (1925) 267 U. S. 479, 69 L. Ed. 745, 45 S. Ct. 431. See also § 226 et seq.

⁵⁸ *Matthews v. Rodgers* (1932) 284 U. S. 521, 76 L. Ed. 447, 52 S. Ct. 217; *Stratton v. St. Louis Southwestern R. Co.* (1932) 284 U. S. 530, 76 L. Ed. 465, 52 S. Ct. 222; *Henrietta Mills v. Rutherford County* (1930) 281 U. S. 121, 74 L. Ed. 737, 50 S. Ct. 270; *Catholic Society of Religious and Literary Education v. Madison County* (C. C. A. 4th, 1935) 74 F. (2d) 848.

⁵⁹ *Keokuk & Hamilton Bridge Co. v. Salm* (1922) 258 U. S. 122, 66 L. Ed. 496, 42 S. Ct. 207. See also § 226 et seq.

of the administrative action assailed. This rule applies to statutory provisions for enforcement of an administrative order,⁶⁰ including a suit under the direction of the Attorney General to collect a forfeiture or penalty providing full opportunity to contest the order's validity;⁶¹ and for suits to enjoin, suspend, annul or set aside administrative orders,⁶² including an "appeal" to an appropriate Circuit Court of Appeals from an order of the Federal Communications Commission.⁶³ Where a taxpayer can pay an alleged illegal or invalid tax under protest, and then bring an action to recover it, observing statutory requirements as to time, notice, etc., there is an adequate state legal remedy.⁶⁴ When a state statute requires tax commissioners to refund a tax found to be illegal, and by a necessary implication confers on the taxpayer a correlative and substantive right to have the refund, there is an adequate remedy at law.⁶⁵ Where the expense of compliance with regulations is not too great and the regulations may be enforced only by legal proceedings⁶⁶ in which ample opportunity to defend exists, there is an adequate remedy at law.⁶⁷

⁶⁰ Federal Trade Commission.

Federal Trade Commission v. Claire Furnace Co. (1927) 274 U. S. 160, 71 L. Ed. 978, 47 S. Ct. 553.

National Labor Relations Board.

Myers v. Bethlehem Shipbuilding Corp. (1938) 303 U. S. 41, 82 L. Ed. 638, 58 S. Ct. 459; E. I. DuPont de Nemours & Co. v. Boland (C. C. A. 2d, 1936) 85 F. (2d) 12; Carlisle Lumber Co. v. Hope (C. C. A. 9th, 1936) 83 F. (2d) 92.

State Agencies.

McDermott v. Bradford (D. C. W. D. Wash., S. Div., 1935) 10 F. Supp. 661.

⁶¹ Federal Trade Commission v. Claire Furnace Co. (1927) 274 U. S. 160, 71 L. Ed. 978, 47 S. Ct. 553.

⁶² Federal Trade Commission.

Royal Baking Powder Co. v. Federal Trade Commission (1929) 59 App. D. C. 70, 32 F. (2d) 966, cert. den. 280 U. S. 572, 74 L. Ed. 624, 50 S. Ct. 28.

National Labor Relations Board.

Myers v. Bethlehem Shipbuilding

Corp. (1938) 303 U. S. 41, 82 L. Ed. 638, 58 S. Ct. 459.

Secretary of Agriculture.

* Abe Rafelson Co. v. Tugwell (C. C. A. 7th, 1935) 79 F. (2d) 653.

⁶³ Black River Valley Broadcasters v. McNinch (1938) 69 App. D. C. 311, 101 F. (2d) 235, cert. den. (1939) 307 U. S. 623, 83 L. Ed. 1501, 59 S. Ct. 793; Sykes v. Jenny Wren Co. (1935) 64 App. D. C. 379, 78 F. (2d) 729, 104 A. L. R. 864, cert. den. 296 U. S. 624, 80 L. Ed. 443, 56 S. Ct. 147.

⁶⁴ Henrietta Mills v. Rutherford County (1930) 281 U. S. 121, 74 L. Ed. 737, 50 S. Ct. 270.

⁶⁵ Union Pac. R. Co. v. Board of Com'rs of Weld County (1918) 247 U. S. 282, 62 L. Ed. 1110, 38 S. Ct. 510.

⁶⁶ As under the Railroad Retirement Acts, 45 USCA 228a-228r.

⁶⁷ California v. Latimer (1938) 305 U. S. 255, 83 L. Ed. 159, 59 S. Ct. 166; Federal Trade Commission v. Claire Furnace Co. (1927) 274 U. S. 160, 71 L. Ed. 978, 47 S. Ct. 553.

An adequate remedy at law against the abuse of the subpoena power by an agency is provided where subpoenas are enforceable only by a statutory court proceeding.⁶⁸

Where a state statute creates a new equitable right of a substantive character, which can be enforced by the pleadings and practice appropriate to a court of equity, such enforcement may be had in a federal court, provided a ground exists for invoking the federal jurisdiction.⁶⁹ Such enforcement is subject to the qualification that enforcement must not impair any right conferred, or conflict with any inhibition imposed, by the Constitution or laws of the United States, and may thus provide an adequate remedy at law.⁷⁰

§ 670. — What Does Not Constitute an Adequate Remedy at Law.

A state legal remedy may not be an adequate remedy at law under federal standards if it is available only in a suit which can neither be begun in nor removed to the federal courts,⁷¹ such as defense to a suit by a state to enforce penalties,⁷² nor where the only opportunity to test the order is by defending a criminal prosecution for violation,⁷³ nor where there is daily confiscation and supersedeas pending state administrative appeal has been refused,⁷⁴ nor where a state tax assessment is final except as subject to equitable intervention.⁷⁵ Where the only ground for supposing that there is an adequate remedy at law is a state statutory provision that "an action respecting the title to property, or arising upon contract may be brought . . . against the state" there is no adequate remedy by which to test a tax assessment. The federal courts should not leave the taxpayer to a

⁶⁸ Federal Trade Commission v. Millers' National Federation (1931) 60 App. D. C. 66, 47 F. (2d) 428.

⁶⁹ Henrietta Mills v. Rutherford County (1930) 281 U. S. 121, 74 L. Ed. 737, 50 S. Ct. 270.

⁷⁰ Henrietta Mills v. Rutherford County (1930) 281 U. S. 121, 74 L. Ed. 737, 50 S. Ct. 270.

⁷¹ Petroleum Exploration v. Public Service Commission (1938) 304 U. S. 209, 82 L. Ed. 1294, 58 S. Ct. 834; Henrietta Mills v. Rutherford County (1930) 281 U. S. 121, 74 L. Ed. 737, 50 S. Ct. 270; Chicago, B. & Q. R. Co. v. Osborne (1924) 265 U. S. 14, 68 L.

Ed. 878, 44 S. Ct. 431. See Sweeney v. Pennsylvania Department of Public Assistance Board (D. C., M. D. Pa., 1940) 33 F. Supp. 587.

⁷² Petroleum Exploration v. Public Service Commission (1938) 304 U. S. 209, 82 L. Ed. 1294, 58 S. Ct. 834.

⁷³ Shields v. Utah Idaho C. R. Co. (1938) 305 U. S. 177, 83 L. Ed. 111, 59 S. Ct. 160.

⁷⁴ Oklahoma Natural Gas Co. v. Russell (1923) 261 U. S. 290, 67 L. Ed. 659, 43 S. Ct. 353. See also § 234.

⁷⁵ Bohler v. Callaway (1925) 267 U. S. 479, 69 L. Ed. 745, 45 S. Ct. 431.

speculation upon what the state court might say if an action at law were brought.⁷⁶

The absence of an adequate remedy at law may be shown by peculiar difficulties confronting a party affected by an order, as for instance, the fact that it is inevitably bound by one of two different statutes, but is not sure which one.⁷⁷ A statutory proceeding may not be an adequate remedy at law if pursuing it gives rise to a multiplicity of suits or circuity of action.⁷⁸

Penalties imposed for violation of a statute or of administrative regulations made under it, may be so extreme as to make the remedies at law inadequate.⁷⁹

§ 671. Statutory Limitations on Federal Equity Jurisdiction Imposed by the Johnson Act.

The Johnson Act⁸⁰ provides a statutory limitation upon the jurisdiction of federal district courts respecting suits affecting state rate

⁷⁶ *Wallace v. Hines* (1920) 253 U. S. 66, 64 L. Ed. 782, 40 S. Ct. 435.

⁷⁷ *Shields v. Utah Idaho C. R. Co.* (1938) 305 U. S. 177, 83 L. Ed. 111, 59 S. Ct. 160.

⁷⁸ *Gilbert v. Sargent* (1927) 57 App. D. C. 207, 19 F. (2d) 681. See also § 666.

⁷⁹ *Texoma Natural Gas Co. v. Railroad Commission of Texas* (D. C. W. D. Tex., 1932) 59 F. (2d) 750; *El Paso & S. W. R. Co. v. Arizona Corporation Commission* (D. C., D. Ariz., 1931) 51 F. (2d) 573.

⁸⁰ 28 USCA 41, subd. (1), " * * * Notwithstanding the foregoing provisions of this paragraph, no district court shall have jurisdiction of any suit to enjoin, suspend, or restrain the enforcement, operation, or execution of any order of an administrative board or commission of a State, or any rate-making body of any political subdivision thereof, or to enjoin, suspend, or restrain any action in compliance with any such order, where jurisdiction is based solely upon the ground of diversity of citizenship, or the repugnance of such order to the Constitution of the United States,

where such order (1) affects rates chargeable by a public utility, (2) does not interfere with interstate commerce, and (3) has been made after reasonable notice and hearing, and where a plain, speedy, and efficient remedy may be had at law or in equity in the courts of such State. Notwithstanding the foregoing provisions of this paragraph, no district court shall have jurisdiction of any suit to enjoin, suspend, or restrain the assessment, levy, or collection of any tax imposed by or pursuant to the laws of any State where a plain, speedy, and efficient remedy may be had at law or in equity in the courts of such State. (As amended May 14, 1934, c. 283, § 1, 48 Stat. 775; Aug. 21, 1937, c. 726, § 1, 50 Stat. 738; April 20, 1940, c. 117, 54 Stat. 143.)"

See "Limitation of Lower Federal Court Jurisdiction Over Public Utility Rate Cases," (1934) 44 *Yale L. Jour.* 119; David E. Lilienthal in "The Federal Courts and State Regulation of Public Utilities," (1930) 43 *Harv. L. Rev.* 379, written before passage of the Johnson Act.

orders and suits to enjoin the collection of taxes. It does not apply where rates have been prescribed without reasonable notice and hearing, either by administrative order,⁸¹ or by local ordinance.⁸²

The United States Supreme Court will not conclude that a state provides no means of obtaining a judicial review of an order of a state commission fixing rates, alleged to be confiscatory, in the absence of a definite decision by the state court to that effect.⁸³ Where the only state remedy, injunction, has been prohibited by statute until final determination of the order's validity, there is no plain, speedy, and efficient remedy in the state courts.⁸⁴ Such a state statute denying state remedy will not be disregarded as unconstitutional to make the Johnson Act applicable until the statute has been authoritatively construed as unconstitutional by the state courts.⁸⁵ A statute which provides that no injunction shall issue except in a proceeding questioning the jurisdiction of the commission, will not be regarded as giving a plain, speedy, and efficient remedy, as jurisdiction is a word of uncertain meaning.⁸⁶

The requirement that there be a plain, speedy and efficient remedy in a state court to justify invoking the Johnson Act is not satisfied by the existence of a legislative remedy in the state court. The requirement of the act refers only to judicial remedies.⁸⁷ The burden of proof is on the party seeking to invoke the Johnson Act to show that a state remedy is judicial,⁸⁸ and the act will not be invoked where the state decisions show that the existence of a judicial remedy is uncertain.⁸⁹ Where a district court, in granting an interlocutory injunction and thereby refusing to invoke the Johnson Act, did so upon the ground that the state decisions rendered uncertain the

⁸¹ *Petroleum Exploration v. Public Service Commission* (1938) 304 U. S. 209, 82 L. Ed. 1294, 58 S. Ct. 834.

⁸² *City of El Paso v. Texas Cities Gas Co.* (C. C. A. 5th, 1938) 100 F. (2d) 501, cert. den. 306 U. S. 650, 83 L. Ed. 1049, 59 S. Ct. 592, rehearing denied 306 U. S. 669, 83 L. Ed. 1063, 59 S. Ct. 643.

⁸³ *Southwestern Bell Telephone Co. v. Oklahoma* (1938) 303 U. S. 206, 82 L. Ed. 751, 58 S. Ct. 528.

⁸⁴ *Mountain States Power Co. v. Public Service Commission of Montana* (1936) 299 U. S. 167, 81 L. Ed. 99, 57 S. Ct. 168.

⁸⁵ *Mountain States Power Co. v.*

Public Service Commission of Montana (1936) 299 U. S. 167, 81 L. Ed. 99, 57 S. Ct. 168.

⁸⁶ *Driscoll v. Edison Light & Power Co.* (1939) 307 U. S. 104, 83 L. Ed. 1134, 59 S. Ct. 715, rehearing denied 307 U. S. 650, 83 L. Ed. 1529, 59 S. Ct. 831.

⁸⁷ *Corporation Commission v. Cary* (1935) 296 U. S. 452, 80 L. Ed. 324, 56 S. Ct. 300. Compare § 226 et seq.

⁸⁸ *Corporation Commission v. Cary* (1935) 296 U. S. 452, 80 L. Ed. 324, 56 S. Ct. 300.

⁸⁹ *Corporation Commission v. Cary* (1935) 296 U. S. 452, 80 L. Ed. 324, 56

S. Ct. 300.

existence of a state judicial remedy, upon appeal to the Supreme Court an intervening state decision clarifying the law will not be considered, since the only question on appeal is abuse of the district court's discretion.⁹⁰

The provision of the Johnson Act that suit in the federal courts may not be had where there is a plain, speedy and efficient remedy at law or in equity in the state court, is important as emphasizing the increasing disinclination of federal authority to interfere in state matters until state remedies have been exhausted.⁹¹ Such disinclination is generally based, however, not on want of power, but on comity. The fact that there is a state court remedy applicable does not oust the federal equity courts of the power to act. The only question is one of propriety of interference.⁹²

Under the section, if, before the final hearing of an application for an interlocutory injunction made as prescribed in the section, a suit shall have been brought in a court of the state having jurisdiction thereof under the laws of such state, to enforce the administrative order in question, accompanied by a stay in such state court of proceedings under the administrative order pending the determination of such suit by such state court, all proceedings in any court of the United States to restrain the execution of the order shall be stayed pending the final determination of such suit in the courts of the state.⁹³ But if there is no stay this provision does not apply.⁹⁴ Nor does it apply where the federal court has issued a temporary restrain-

⁹⁰ *Corporation Commission v. Cary* (1935) 296 U. S. 452, 80 L. Ed. 324, 56 S. Ct. 300.

⁹¹ *City of El Paso v. Texas Cities Gas Co.* (C. C. A. 5th, 1938) 100 F. (2d) 501, cert. den. 306 U. S. 650, 83 L. Ed. 1049, 59 S. Ct. 592, rehearing denied 306 U. S. 669, 83 L. Ed. 1063, 59 S. Ct. 643.

⁹² *City of El Paso v. Texas Cities Gas Co.* (C. C. A. 5th, 1938) 100 F. (2d) 501, cert. den. 306 U. S. 650, 83 L. Ed. 1049, 59 S. Ct. 592, rehearing denied 306 U. S. 669, 83 L. Ed. 1063, 59 S. Ct. 643. Compare § 226 et seq.

⁹³ *New Jersey Suburban Water Co. v. Board of Public Utility Com'rs* (D. C. D. N. J., 1938) 23 F. Supp. 752.

See *Blackmore v. Public Service Commission of Pennsylvania* (D. C. M. D. Pa., 1935) 12 F. Supp. 751, appeal dismissed 299 U. S. 617, 81 L. Ed. 455, 57 S. Ct. 757.

⁹⁴ *Pacific Telephone & Telegraph Co. v. Kuykendall* (1924) 265 U. S. 196, 68 L. Ed. 975, 44 S. Ct. 553; *Home Telephone & Telegraph Co. v. Kuykendall* (1924) 265 U. S. 206, 68 L. Ed. 982, 44 S. Ct. 557; *Montana Power Co. v. Public Service Commission* (D. C. D. Mont., 1935) 12 F. Supp. 946. See also *Oklahoma Gas & Electric Co. v. Corporation Commission* (D. C. W. D. Okla., 1932) 1 F. Supp. 966.

ing order directed against state officials who subsequently institute proceedings in the state court.⁹⁵

A stay of proceedings has been granted in a suit in a federal court assailing an administrative order as confiscatory, upon institution in a state court of a suit to enforce the order in question and stay of proceedings under the administrative order.⁹⁶ All federal questions may be raised in the state court suit and ultimately decided by the United States Supreme Court.

The Johnson Act does not apply in suits brought against governmental officers of Puerto Rico.⁹⁷

2. Particular Requisites of Jurisdiction Under Judicial Code Section 266: State Administrative Orders

§ 672. Judicial Code Section 266: Special Courts and Expedited Procedure for Review of State Action.

The methods by which the right to judicial review is secured vary in different jurisdictions. In federal courts the method of procedure, when state administrative orders are attacked as unconstitutional, is now regulated by section 266 of the Judicial Code as amended.⁹⁸ This section requires three-judge courts and expedited procedure for review of state action in certain cases.⁹⁹ The section refers to in-

⁹⁵ Union Light, Heat & Power Co. v. Railroad Commission (D. C. E. D. Ky., 1926) 17 F. (2d) 143.

⁹⁶ Lone Star Gas Co. v. Texas (1938) 304 U. S. 224, 82 L. Ed. 1304, 58 S. Ct. 883, rehearing denied 304 U. S. 590, 82 L. Ed. 1549, 58 S. Ct. 1051.

⁹⁷ Munoz v. Porto Rico Railway Light & Power Co. (C. C. A. 1st, 1936) 83 F. (2d) 262, cert. den. 298 U. S. 689, 80 L. Ed. 1408, 56 S. Ct. 955.

⁹⁸ Wadley Southern Ry. v. Georgia (1915) 235 U. S. 651, 59 L. Ed. 405, 35 S. Ct. 214; Great Falls Gas Co. v. Public Service Commission (D. C. D. Mont., 1930) 39 F. (2d) 176.

⁹⁹ 28 USCA 380, "No interlocutory injunction suspending or restraining the enforcement, operation or execution of any statute of a State by re-

straining the action of any officer of such State in the enforcement or execution of such statute, or in the enforcement or execution of an order made by an administrative board or commission acting under and pursuant to the statutes of such State, shall be issued or granted by any justice of the Supreme Court, or by any district court of the United States, or by any judge thereof, or by any circuit judge acting as district judge, upon the ground of the unconstitutionality of such statute, unless the application for the same shall be presented to a justice of the Supreme Court of the United States, or to a circuit or district judge, and shall be heard and determined by three judges, of whom at least one shall be a justice of the Supreme Court or a circuit judge, and

junctions against orders as well as statutes, but mentions only the unconstitutionality of the statute in stating the ground for relief. Nevertheless the section applies where the order only, and not a statute, is attacked on constitutional grounds,¹ even though after con-

the other two may be either circuit or district judges, and unless a majority of said three judges shall concur in granting such application. Whenever such application as aforesaid is presented to a justice of the Supreme Court, or to a judge, he shall immediately call to his assistance to hear and determine the application two other judges: *Provided, however*, That one of such three judges shall be a justice of the Supreme Court, or a circuit judge. Said application shall not be heard or determined before at least five days' notice of the hearing has been given to the governor and to the attorney general of the State, and to such other persons as may be defendants in the suit: *Provided*, That if of opinion that irreparable loss or damage would result to the complainant unless a temporary restraining order is granted, any justice of the Supreme Court, or any circuit or district judge, may grant such temporary restraining order at any time before such hearing and determination of the application for an interlocutory injunction, but such temporary restraining order shall remain in force only until the hearing and determination of the application for an interlocutory injunction upon notice as aforesaid. The hearing upon such application for an interlocutory injunction shall be given precedence and shall be in every way expedited and be assigned for a hearing at the earliest practicable day after the expiration of the notice hereinbefore provided for. An appeal may be taken direct to the Supreme Court of the United States from the order granting or denying, after notice and hearing, an interlocutory injunction

in such case. It is further provided that if before the final hearing of such application a suit shall have been brought in a court of the State having jurisdiction thereof under the laws of such State, to enforce such statute or order, accompanied by a stay in such State court of proceedings under such statute or order pending the determination of such suit by such State court, all proceedings in any court of the United States to restrain the execution of such statute or order shall be stayed pending the final determination of such suit in the courts of the State. Such stay may be vacated upon proof made after hearing, and notice of ten days served upon the attorney general of the State, that the suit in the State courts is not being prosecuted with diligence and good faith. The requirement respecting the presence of three judges shall also apply to the final hearing in such suit in the district court; and a direct appeal to the Supreme Court may be taken from a final decree granting or denying a permanent injunction in such suit. (June 18, 1910, c. 309, § 17, 36 Stat. 557; Mar. 3, 1911, c. 231, § 266, 36 Stat. 1162; Mar. 4, 1913, c. 160, 37 Stat. 1013; Feb. 13, 1925, c. 229, § 1, 43 Stat. 938.)''

¹ *Champlin Refining Co. v. Corporation Commission* (1932) 286 U. S. 210, 76 L. Ed. 1062, 52 S. Ct. 559, 86 A. L. R. 403; *Herkness v. Irion* (1928) 278 U. S. 92, 73 L. Ed. 198, 49 S. Ct. 40; *Prendergast v. New York Telephone Co.* (1923) 262 U. S. 43, 67 L. Ed. 853, 43 S. Ct. 466; *Oklahoma Natural Gas Co. v. Russell* (1923) 261 U. S. 290, 67 L. Ed. 659, 43 S. Ct. 353.

sideration the case may be disposed of without passing on the constitutional question.²

Where an interlocutory injunction is prayed, the application must be heard before three judges. A single judge has no jurisdiction to deny the application,³ and, if an application for an interlocutory injunction is made, a single judge has no jurisdiction to dissolve a temporary restraining order,⁴ or dismiss a bill on the merits.⁵

However, where after a hearing before three judges a permanent injunction is granted, one judge may dispose of a motion to strike matter alleged to have been improperly included in the form of final decree presented by counsel.⁶

§ 673. Reason for Special Requirement of Three Judges.

When an interlocutory decree enjoins the enforcement of a state law or the action of state officials under that law, the respect due to the state demands that the need for nullifying the action of its legislature or of its executive officials be persuasively shown. It was to insure careful and deliberate action upon interlocutory applications that Congress required that they be heard before three judges.⁷ This legislation was intended to insure that the enforcement of a challenged statute should not be suspended by injunction except upon a clear and persuasive showing of unconstitutionality and irreparable injury. Congress intended that, in this class of suits, prompt hearing and decision should be afforded the parties so that the states shall be put to the least possible inconvenience in the administration of their laws.⁸

² *Herkness v. Irion* (1928) 278 U. S. 92, 73 L. Ed. 198, 49 S. Ct. 40; *Chicago, G. W. R. Co. v. Kendall* (1924) 266 U. S. 94, 69 L. Ed. 183, 45 S. Ct. 55; *Brucker v. Fisher* (C. C. A. 6th, 1931) 49 F. (2d) 759.

³ *Ex parte Northern Pac. R. Co.* (1929) 280 U. S. 142, 74 L. Ed. 233, 50 S. Ct. 70; *Ex parte Metropolitan Water Co.* (1911) 220 U. S. 539, 55 L. Ed. 576, 31 S. Ct. 600; *Suncrest Lumber Co. v. North Carolina Park Commission* (C. C. A. 4th, 1928) 29 F. (2d) 823.

⁴ *Ex parte Northern Pac. R. Co.* (1929) 280 U. S. 142, 74 L. Ed. 233, 50 S. Ct. 70; *Ex parte Metropolitan Water Co.* (1911) 220 U. S. 539, 55 L. Ed. 576, 31 S. Ct. 600.

⁵ *Ex parte Northern Pac. R. Co.*

(1929) 280 U. S. 142, 74 L. Ed. 233, 50 S. Ct. 70; *Ex parte Metropolitan Water Co.* (1911) 220 U. S. 539, 55 L. Ed. 576, 31 S. Ct. 600. See also *Great Falls Gas Co. v. Public Service Commission* (D. C. D. Mont., 1930) 39 F. (2d) 176.

⁶ *Great Falls Gas Co. v. Public Service Commission* (D. C. D. Mont., 1930) 39 F. (2d) 176.

⁷ *Public Service Commission v. Wisconsin Telephone Co.* (1933) 289 U. S. 67, 77 L. Ed. 1036, 53 S. Ct. 514; *Great Falls Gas Co. v. Public Service Commission* (D. C. D. Mont., 1930) 39 F. (2d) 176.

⁸ *Mayo v. Lakeland Highlands Canning Co.* (1940) 309 U. S. 310, 84 L. Ed. 774, 60 S. Ct. 517.

If a judicial interference is sought with the exercise of a power delegated to a state agency, the power must be clearly shown to have been transcended. This must not be left as a conclusion from the balancing of conflicting affidavits, or even on *ex parte* affidavits. Courts are reluctant to interfere with the laws of a state or with the tribunals constituted to enforce them. Doubts will not be resolved against the law, nor the decision of its tribunals prevented or anticipated unless the necessity for either be demonstrated.⁹

§ 674. Matters Not Within Act Excluded from Special Court's Jurisdiction.

Where a state statute is attacked on grounds other than unconstitutionality, such as the ground that it is no longer in force, the case is not within section 266.¹⁰ Where a three-judge court, having jurisdiction under the section, issues a supplemental injunction order to protect its jurisdiction, not involving an attack on the state statute or order as unconstitutional, such order is not within section 266, and not appealable directly to the Supreme Court. The protection of the court's jurisdiction is a right and duty not limited by section 266.¹¹ The special procedure of section 266 is used only in the cases designated. And where part of a suit is within the act and part not, the parts are severed. Thus where the suit is to restrain both state and federal officers involved in a single regulatory scheme, the three-judge court will sever the cause of action against the federal officials and send it to a single judge, retaining jurisdiction of the suit against the state officers.¹² For section 266 to apply, the claim of unconstitutionality must be substantial.¹³ And, even where there is no substance in the constitutional questions raised by some parties, other parties who have other grounds of federal jurisdiction, such as diversity of citizenship, may be entitled to maintain the suit before a single judge, although not entitled to a hearing before a three-judge court.¹⁴

⁹ *Grand Trunk Ry. v. Michigan Railroad Commission* (1913) 231 U. S. 457, 58 L. Ed. 310, 34 S. Ct. 152.

¹⁰ *Ex parte Buder* (1926) 271 U. S. 461, 70 L. Ed. 1036, 46 S. Ct. 557.

¹¹ *Looney v. Eastern Texas R. Co.* (1918) 247 U. S. 214, 62 L. Ed. 1084, 38 S. Ct. 460.

¹² *Panama Refining Co. v. Ryan* (1935) 293 U. S. 388, 79 L. Ed. 446,

55 S. Ct. 241.

¹³ *Ex parte Buder* (1926) 271 U. S. 461, 70 L. Ed. 1036, 46 S. Ct. 557; *Brucker v. Fisher* (C. C. A. 6th, 1931) 49 F. (2d) 759; *Wylie v. State Board of Equalization* (D. C. S. D. Cal., Cent. Div., 1937) 21 F. Supp. 604.

¹⁴ *Mayo v. Lakeland Highlands Canning Co.* (1940) 309 U. S. 310, 84 L. Ed. 774, 60 S. Ct. 517.

§ 675. Only Administrative Orders Reviewable Under Act.

A case does not fall within section 266 unless a statute or administrative order is challenged on constitutional grounds.¹⁵ Jurisdiction under the section does not apply to mere administrative findings. The difference between the function of regulating, expressed in the orders of an agency, and the function of fact finding, is vital.¹⁶ Hence tax assessments may not be reviewed under the section, and tax cases where administrative discrimination is alleged do not ordinarily fall under section 266.¹⁷ The written "assent" of a state agency to the compromise of a claim for back taxes of an insolvent municipality, is not an order reviewable under section 266.¹⁸

Orders reviewable under section 266 include an order establishing rates which, though temporary, will not be changed for the period in which they are to be effective,¹⁹ and a reparation order made by a state agency.²⁰ Notices to attend a hearing to determine the agency's jurisdiction under the state compensation law issued by a state agency, *sua sponte*, have been held to be an order reviewable under section 266.²¹

§ 676. First Main Requisite: Order Must Be of State Functionary.

Despite the generality of the language of the section, it has been held to be applicable only to a statute of general application throughout a state.²² And while a local official, when he enforces a statute which embodies a policy of statewide concern, may be performing a

¹⁵ Ex parte Williams (1928) 277 U. S. 267, 72 L. Ed. 877, 48 S. Ct. 523.

¹⁶ Ex parte Williams (1928) 277 U. S. 267, 72 L. Ed. 877, 48 S. Ct. 523.

¹⁷ Ex parte Bransford (1940) 310 U. S. 354, 84 L. Ed. 1249, 60 S. Ct. 947; Ex parte Williams (1928) 277 U. S. 267, 72 L. Ed. 877, 48 S. Ct. 523; St. Louis Southwestern Ry. Co. v. Board of Directors (C. C. A. 8th, 1929) 32 F. (2d) 124; Lehigh Valley R. Co. of New Jersey v. Martin (D. C. D. N. J., 1936) 19 F. Supp. 63. But see Southern Ry. Co. v. Query (D. C. E. D. S. C., 1927) 21 F. (2d) 333; Western Union Telegraph Co. v. Tax Commission of Ohio

(D. C. S. D. Ohio, E. Div., 1927) 21 F. (2d) 355. See also § 401 et seq.

¹⁸ Wilentz v. Sovereign Camp, Woodmen of the World (1939) 306 U. S. 573, 83 L. Ed. 994, 59 S. Ct. 709.

¹⁹ Prendergast v. New York Telephone Co. (1923) 262 U. S. 43, 67 L. Ed. 853, 43 S. Ct. 466.

²⁰ El Paso & S. W. R. Co. v. Arizona Corporation Commission (D. C. D. Ariz., 1931) 51 F. (2d) 573.

²¹ Albee Godfrey Whale Creek Co. v. Perkins (D. C. S. D. N. Y., 1933) 6 F. Supp. 409.

²² Rorick v. Everglades Drainage Dist. (1939) 307 U. S. 208, 83 L. Ed. 1242, 59 S. Ct. 808.

state function within the meaning of section 266,²³ a state official charged with duties not of statewide concern is not a state functionary, so that his orders are not reviewable under section 266.²⁴ Orders of state functionaries reviewable under the section include an order of a state agency which applies the agency's powers, exercisable throughout the state, to a local situation,²⁵ and an order which, though statewide in terms, may affect a petitioner in a very small area only.²⁶ Thus state administrative action affecting a few miles of roadway built by federal aid is within the purview of section 266.²⁷

The order of a state administrative officer, such as an insurance commissioner, is reviewable under section 266.²⁸ And the fact that a state commission is incorporated does not alter its character as a state agency, under section 266.²⁹

As Puerto Rico is not a state, and as the relationship between it and the federal judiciary differs greatly from that existing between state governments and the federal judiciary, section 266 does not apply to suits brought against governmental officers of Puerto Rico.³⁰

§ 677. — State Agency Must Be Substantial Party Defendant.

In order for section 266 to apply, the state agency must be a substantial, not nominal, party defendant.³¹ Allegations to this effect should be set forth in the bill and supported by proof at the final hearing.³² Incidental relief, such as a claim for damages, may be included where the substance of the action is clearly within the section,³³ but the case is not one for three judges where recovery of

²³ Rorick v. Everglades Drainage Dist. (1939) 307 U. S. 208, 83 L. Ed. 1242, 59 S. Ct. 808.

²⁴ Rorick v. Everglades Drainage Dist. (1939) 307 U. S. 208, 83 L. Ed. 1242, 59 S. Ct. 808.

²⁵ Railroad Commission v. Maxey (1931) 282 U. S. 249, 75 L. Ed. 322, 51 S. Ct. 153.

²⁶ Morris v. Duby (1927) 274 U. S. 135, 71 L. Ed. 966, 47 S. Ct. 548.

²⁷ Morris v. Duby (1927) 274 U. S. 135, 71 L. Ed. 966, 47 S. Ct. 548.

²⁸ Moore v. Fidelity & Deposit Co. (1926) 272 U. S. 317, 71 L. Ed. 273, 47 S. Ct. 105.

²⁹ Suncrest Lumber Co. v. North Carolina Park Commission (C. C. A.

4th, 1928) 29 F. (2d) 823.

³⁰ Munoz v. Porto Rico Railway Light & Power Co. (C. C. A. 1st, 1936) 83 F. (2d) 262, cert. den. 298 U. S. 689, 80 L. Ed. 1408, 56 S. Ct. 955.

³¹ Wilentz v. Sovereign Camp, Woodmen of the World (1939) 306 U. S. 573, 83 L. Ed. 994, 59 S. Ct. 709; Oklahoma Gas & Electric Co. v. Oklahoma Packing Co. (1934) 292 U. S. 386, 78 L. Ed. 1318, 54 S. Ct. 732.

³² Oklahoma Gas & Electric Co. v. Oklahoma Packing Co. (1934) 292 U. S. 386, 78 L. Ed. 1318, 54 S. Ct. 732.

³³ Oklahoma Gas & Electric Co. v. Oklahoma Packing Co. (1934) 292 U. S. 386, 78 L. Ed. 1318, 54 S. Ct. 732.

alleged overpayments is the only matter in controversy from the standpoint of substance.³⁴

§ 678. Second Main Requisite: Interlocutory Injunction Must Be Sought.

Section 266 does not require a court of three judges on the final hearing unless an application for an interlocutory injunction is pressed to a hearing. If the application is not so pressed, the final hearing may be before a single judge.³⁵ It is probably not error for three judges to sit in the latter case.³⁶ Thus where an original bill in equity in a federal district court assailing an order of a state Public Service Commission fixing temporary rates was heard before three judges pursuant to section 266 of the Judicial Code, on application for an interlocutory injunction, a hearing on an amended and supplemental bill in the same case, which did not seek an interlocutory injunction, assailing a later order of the same agency fixing permanent rates, was properly heard before a single judge of the same court, and referred to a special master.³⁷

³⁴ *Oklahoma Gas & Electric Co. v. Oklahoma Packing Co.* (1934) 292 U. S. 386, 78 L. Ed. 1318, 54 S. Ct. 732.

³⁵ **Smith v. Wilson* (1927) 273 U. S. 388, 71 L. Ed. 699, 47 S. Ct. 385; *Moore v. Fidelity & Deposit Co.* (1926) 272 U. S. 317, 71 L. Ed. 273, 47 S. Ct. 105; *Seaboard Air Line Ry. Co. v. Railroad Commission of Georgia* (C. C. A. 5th, 1914) 213 Fed. 27, aff'd 240 U. S. 324, 60 L. Ed. 669, 36 S. Ct. 260.

"We conclude that the section as amended does not require a court of three judges on the final hearing unless an application for preliminary injunction is pressed to a hearing. In that case, an appeal either from the determination on the preliminary application or from the final decree may be taken directly to this Court. The plaintiff is thus given an election. He may either make application for an interlocutory injunction, which must be heard by three judges, in which case the final hearing must

be before a like court with appeal directly to this Court, or he may not press an application for an interlocutory injunction, in which case the final hearing may be before a single judge, whose decision may be reviewed by the circuit court of appeals and this Court under other applicable provisions of the Judicial Code. Here there was no application for an interlocutory injunction and hence no necessity for a final hearing before three judges, although it may not have been erroneous for three judges to sit, a question we do not find it necessary to decide." (Mr. Justice Stone in *Smith v. Wilson* (1927) 273 U. S. 388, 391, 71 L. Ed. 699, 47 S. Ct. 385.)

³⁶ *Brucker v. Fisher* (C. C. A. 6th, 1931) 49 F. (2d) 759. See *Smith v. Wilson* (1927) 273 U. S. 388, 71 L. Ed. 699, 47 S. Ct. 385.

³⁷ *McCart v. Indianapolis Water Co.* (1938) 302 U. S. 419, 82 L. Ed. 336, 58 S. Ct. 324.

The requirement that application for an interlocutory injunction be "made and pressed" means "pressed to a hearing" and not, necessarily, decided. Once the jurisdiction of the three-judge court is properly invoked, it continues at least as long as the application for interlocutory injunction has not been withdrawn. The determinative question is whether plaintiff has pressed his application, so as to procure the immediate hearing and early decision provided by the statute.³⁸

§ 679. — Questions Raised by Application for Interlocutory Injunction.

Upon application for an interlocutory injunction the question before the court is whether the showing made raises serious questions, under the Federal Constitution and the state law, and discloses that enforcement of the act, pending final hearing, would inflict irreparable damages upon the complainants.³⁹ It is serious error for a court, upon motion for temporary injunction, to decide whether an act is unconstitutional or whether an agency has complied with the requirements of the act. These questions are not before it.⁴⁰

§ 680. Mandamus Proper Method to Decide Jurisdiction Under Section 266.

Where there is a question whether the case is one of those for which the special court and procedure of section 266 is provided, mandamus to direct a district judge to convene such a court is the proper remedy.⁴¹

§ 681. Single Judge May Determine Whether Federal Jurisdiction Exists.

The question of federal equity jurisdiction in a case otherwise appropriate for a three-judge court under section 266 may be decided by a single judge upon a motion requiring scrutiny of the bill of complaint.⁴²

³⁸ *Brueker v. Fisher* (C. C. A. 6th, 1931) 49 F. (2d) 759.

³⁹ *Mayo v. Lakeland Highlands Canning Co.* (1940) 309 U. S. 310, 84 L. Ed. 774, 60 S. Ct. 517.

⁴⁰ *Mayo v. Lakeland Highlands Canning Co.* (1940) 309 U. S. 310, 84 L. Ed. 774, 60 S. Ct. 517.

⁴¹ *Ex parte Bransford* (1940) 310 U. S. 354, 84 L. Ed. 1249, 60 S. Ct. 947; *Ex parte Williams* (1928) 277

U. S. 267, 72 L. Ed. 877, 48 S. Ct. 523; *Ex parte Metropolitan Water Co.* (1911) 220 U. S. 539, 55 L. Ed. 576, 31 S. Ct. 600; *Grigsby v. Harris* (D. C. S. D. Tex., at Houston, 1928) 27 F. (2d) 942, 945.

⁴² *Ex parte Poresky* (1933) 290 U. S. 30, 78 L. Ed. 152, 54 S. Ct. 3; *International Ry. Co. v. Prendergast* (D. C. W. D. N. Y., 1928) 29 F. (2d) 296.

§ 682. Johnson Act Limits Jurisdiction of Suit Under Section 266.

The provisions of the Johnson Act⁴³ which limit federal equity jurisdiction generally, limit it also respecting suits brought pursuant to section 266 of the Judicial Code.⁴⁴

3. Particular Requisites of Jurisdiction Under 28 USCA 380a;
Federal Administrative Orders

§ 683. Limited Review Under the Act of August 24, 1937.⁴⁵

The Act of August 24, 1937, c. 754, § 3, 50 Stat. 751, 28 USCA 380a, provides for a three-judge district court and direct appeal to the Supreme Court in certain attacks upon the constitutionality of an Act of Congress.⁴⁶ It is a companion section to section 266 of

⁴³ 28 USCA 41 (1). See also § 671.

⁴⁴ New Jersey Suburban Water Co. v. Board of Public Utility Com'rs (D. C. D. N. J., 1938) 23 F. Supp. 752.

⁴⁵ 28 USCA 380a.

⁴⁶ 28 USCA 380a, "No interlocutory or permanent injunction suspending or restraining the enforcement, operation, or execution of, or setting aside, in whole or in part, any Act of Congress upon the ground that such Act or any part thereof is repugnant to the Constitution of the United States shall be issued or granted by any district court of the United States, or by any judge thereof, or by any circuit judge acting as district judge, unless the application for the same shall be presented to a circuit or district judge, and shall be heard and determined by three judges, of whom at least one shall be a circuit judge. When any such application is presented to a judge, he shall immediately request the senior circuit judge (or in his absence, the presiding circuit judge) of the circuit in which such district court is located to designate two other judges to participate in hearing and determining such application. It shall be the duty of the senior circuit judge or the presiding circuit judge, as the case may be, to

designate immediately two other judges from such circuit for such purpose, and it shall be the duty of the judges so designated to participate in such hearing and determination. Such application shall not be heard or determined before at least five days' notice of the hearing has been given to the Attorney General and to such other persons as may be defendants in the suit: *Provided*, That if of opinion that irreparable loss or damage would result to the petitioner unless a temporary restraining order is granted, the judge to whom the application is made may grant such temporary restraining order at any time before the hearing and determination of the application, but such temporary restraining order shall remain in force only until such hearing and determination upon notice as aforesaid, and such temporary restraining order shall contain a specific finding, based upon evidence submitted to the court making the order and identified by reference thereto, that such irreparable loss or damage would result to the petitioner and specifying the nature of the loss or damage. The said court may, at the time of hearing such application, upon a like finding, continue the temporary stay or suspension, in

the Judicial Code which provides for review of state statutes and orders,⁴⁷ and is likewise interpreted to require that the constitutional question be substantial.⁴⁸ Although it has been said in regard to section 266 that the word "statute" included administrative acts done under authority of statutes,⁴⁹ Congress amended it to apply also to orders of administrative agencies, out of abundant caution. This distinction is controlling in the construction of the new companion-section, and since the words "Acts of Congress" alone are used, administrative action may not be reviewed under it, at least when there is not also jurisdiction to review the statute under which the agency acted. With section 266 as amended before it, it does not appear that Congress intended to include such action within the scope of the statute.⁵⁰

In view of the fact that the word "interlocutory" in section 266 has been held to exclude permanent injunctions,^{50a} it is significant that the new act says "No interlocutory or permanent injunction . . ."

whole or in part, until decision upon the application. The hearing upon any such application for an interlocutory or permanent injunction shall be given precedence and shall be in every way expedited and be assigned for a hearing at the earliest practicable day. An appeal may be taken directly to the Supreme Court of the United States upon application therefor or notice thereof within thirty days after the entry of the order, decree, or judgment granting or denying, after notice and hearing, an interlocutory or permanent injunction in such case. In the event that an appeal is taken under this section, the record shall be made up and the case docketed in the Supreme Court of the United States within sixty days from the time such appeal is allowed, under such rules as may be prescribed by the proper courts. Appeals under this section shall be heard by the Supreme Court of the United States at the earliest possible time and shall take precedence over all other

matters not of a like character. This section shall not be construed to be in derogation of any right of direct appeal to the Supreme Court of the United States under existing provisions of law. (Aug. 24, 1937, c. 754, § 3, 50 Stat. 752.)"

⁴⁷ *Rok v. Legg* (D. C. S. D. Cal., 1939) 27 F. Supp. 243. See also § 672.

⁴⁸ *California Water Service Co. v. Redding* (1938) 304 U. S. 252, 82 L. Ed. 1323, 58 S. Ct. 865; *William Jameson & Co. v. Morgenthau* (1939) 307 U. S. 171, 83 L. Ed. 1189, 59 S. Ct. 804.

⁴⁹ *William Jameson & Co. v. Morgenthau* (1939) 307 U. S. 171, 83 L. Ed. 1189, 59 S. Ct. 804.

⁵⁰ *William Jameson & Co. v. Morgenthau* (1939) 307 U. S. 171, 83 L. Ed. 1189, 59 S. Ct. 804.

^{50a} *McCart v. Indianapolis Water Co.* (1938) 302 U. S. 419, 82 L. Ed. 336, 58 S. Ct. 324.

*D. In State Courts***§ 684. Jurisdiction Concurrent with That of Federal Courts to Some Extent.**

The jurisdiction of state courts, with certain exceptions, is concurrent with that of federal courts as to civil suits arising under the Constitution and laws of the United States.⁵¹ Thus the judgment of a state court may be *res judicata* in a federal court.⁵² But obviously neither the legislature nor the courts of a state can limit the power of the Interstate Commerce Commission, for instance, to compel connections with private side tracks.⁵³ Thus the fact that a state supreme court held a state commission order void, because it affected a track which was an "extension" within paragraphs 18 to 21 of section 1 of the Interstate Commerce Act, does not estop the shipper from denying that it is within those paragraphs,⁵⁴ nor the commission from proceeding under paragraph 9 of the section to compel a switch connection, where the case properly falls within that paragraph.⁵⁵ In this instance, paragraphs 18 to 21 excluded from the commission's jurisdiction extensions which were switching tracks wholly within one state. Hence the shipper, having convinced the state court that the order of the state commission was void because the matter was within the jurisdiction of the federal commission, then insisted that the latter could not act because of the state decision. But the state court decision could not affect the validity of the order of the Interstate Commerce Commission. If it could, construction would not be compellable under either state or federal law.⁵⁶

§ 685. State Courts Without Jurisdiction to Invalidate Orders of Federal Agencies.

In the absence of statutory provisions a state court has no authority to invalidate an order of a federal administrative agency. Thus a state court has no jurisdiction to enjoin, set aside, annul or suspend

⁵¹ Grubb v. Public Utilities Commission (1930) 281 U. S. 470, 74 L. Ed. 972, 50 S. Ct. 374. See also § 615.

⁵² Grubb v. Public Utilities Commission (1930) 281 U. S. 470, 74 L. Ed. 972, 50 S. Ct. 374.

⁵³ Cleveland, C., C. & St. L. R. Co. v. United States (1928) 275 U. S. 404, 72 L. Ed. 338, 48 S. Ct. 189.

⁵⁴ Cleveland, C., C. & St. L. R. Co. v. United States (1928) 275 U. S. 404, 72 L. Ed. 338, 48 S. Ct. 189.

⁵⁵ Cleveland, C., C. & St. L. R. Co. v. United States (1928) 275 U. S. 404, 72 L. Ed. 338, 48 S. Ct. 189.

⁵⁶ Cleveland, C., C. & St. L. R. Co. v. United States (1928) 275 U. S. 404, 72 L. Ed. 338, 48 S. Ct. 189.

an order of the Interstate Commerce Commission, in whole or in part.⁵⁷ No form of pleading nor manner of introducing such an order into the case may operate to empower a state court to set it aside, as an order may be as effectively annulled by a misconstruction or misapplication as by setting it aside in a suit avowedly brought to do so.⁵⁸ Likewise, an order of the Interstate Commerce Commission, interposed as a defense to a suit to enjoin the promulgation of express rates prescribed by the order which were higher than those authorized by the state agency, could not be invalidated in that suit.⁵⁹

Since the jurisdiction over suits involving the validity of orders of federal administrative agencies is exclusively in the federal courts, those courts cannot exercise jurisdiction in an action removed from the state court which was without jurisdiction in the first place.⁶⁰

But under some statutory provisions a state court may review an order of a federal administrative agency.⁶¹

IV. JURISDICTION OF SUITS TO RESTRAIN CRIMINAL PROSECUTIONS

§ 686. In General.

While ordinary enforcement proceedings in courts are civil in nature, even though the United States be a party,⁶² a statute may provide, as does the Railway Labor Act,⁶³ for enforcement by a criminal prosecution brought by the United States Attorney for the district. Equity is a proper forum to which a party affected by an order which subjects it to such prosecution may properly resort, when it is essential to the protection of the rights asserted, even though it seeks to enjoin a criminal action.⁶⁴

⁵⁷ *American Express Co. v. South Dakota ex rel. Caldwell* (1917) 244 U. S. 617, 61 L. Ed. 1352, 37 S. Ct. 656; *Southern Pac. Co. v. City of Willow Glen* (C. C. A. 9th, 1931) 49 F. (2d) 1005, cert. den. 284 U. S. 666, 76 L. Ed. 564, 52 S. Ct. 39.

⁵⁸ *American Express Co. v. South Dakota ex rel. Caldwell* (1917) 244 U. S. 617, 61 L. Ed. 1352, 37 S. Ct. 656.

⁵⁹ *American Express Co. v. South Dakota ex rel. Caldwell* (1917) 244 U. S. 617, 61 L. Ed. 1352, 37 S. Ct. 656.

⁶⁰ *Southern Pac. Co. v. City of Willow Glen* (C. C. A. 9th, 1931) 49 F. (2d) 1005, cert. den. 284 U. S. 666, 76 L. Ed. 564, 52 S. Ct. 39; *Sullivan v. Missouri Pacific Lines* (D. C. W. D. Tex., 1931) 1 F. Supp. 803.

⁶¹ 7 USCA 1365, 1366.

⁶² *McCrone v. United States* (1939) 307 U. S. 61, 83 L. Ed. 1108, 59 S. Ct. 685.

⁶³ 45 USCA 151 et seq.

⁶⁴ *Shields v. Utah Idaho C. R. Co.* (1938) 305 U. S. 177, 83 L. Ed. 111, 59 S. Ct. 160.

V. JURISDICTION OF SUITS TO COMPEL AGENCY TO ACT, OR REFRAIN FROM ACTING, IN ACCORDANCE WITH CORRECT LEGAL PRINCIPLES

§ 687. Introduction.

Suits brought to compel an administrative agency to do, or refrain from doing, an act, can only succeed where success rests basically on the determination of a judicial question, that is, correct legal principles, the initial decision of which has not been impliedly committed by statute to an administrative agency as part of an administrative scheme. Of course, if success in the suit rests upon determination of any administrative question, preliminary resort to the administrative agency is necessary.⁶⁵ And if initial decision of a judicial question or the correctness of the legal principles involved, has been committed to an agency, failure to obtain an initial administrative decision on the judicial question precludes suit in court turning on that question until the administrative remedy has been exhausted.

However, where (1) the right to relief rests basically on the decision of one or more judicial questions only, which (2) have not been committed for initial administrative decision, either mandamus,⁶⁶ prohibition,⁶⁷ or injunction,⁶⁸ may be appropriate remedies to compel the agency to do or refrain from doing the act in question in accordance with correct legal principles.

A. *Mandamus*

§ 688. In General.

The use of mandamus with respect to administrative agencies is analogous to its use when directed to a judicial officer.⁶⁹ A suit for a mandatory injunction is in effect equivalent to a writ of mandamus and governed by like considerations.⁷⁰ It provides a form of judicial review of negative administrative action, that is, the failure or refusal of an agency to perform a duty imposed upon it by law.⁷¹ Since

⁶⁵ See § 213 et seq.

⁶⁶ See § 688.

⁶⁷ See § 703.

⁶⁸ See § 704.

⁶⁹ *United States ex rel. Maine Potato Growers & Shippers Ass'n v. Interstate Commerce Commission* (1937) 66 App. D. C. 398, 88 F. (2d) 780. See *Ex parte Roe* (1914) 234 U.

S. 70, 58 L. Ed. 1217, 34 S. Ct. 722.

⁷⁰ *Miguel v. McCarl* (1934) 291 U. S. 442, 78 L. Ed. 901, 54 S. Ct. 465; *Gaines v. Thompson* (1868) 7 Wall. (74 U. S.) 347, 19 L. Ed. 62.

⁷¹ "It is obvious from the statement we have made, as well as from the character of the remedy invoked, mandamus, that we are required to

administrative agencies are the creatures of statute,⁷² the nature and extent of their duties are controlled by statute, and the right to mandamus depends primarily upon statutory construction.⁷³ It may also depend, however, upon implicit constitutional requirements. Affirmative administrative action is ordinarily expressed by a direction embodied in an order, which may be assailed in various ways.⁷⁴

Mandamus is a remedy ancillary to a court's jurisdiction. The Supreme Court does not have original jurisdiction over controversies with administrative agencies, and hence the remedy of mandamus is in aid of the Supreme Court's appellate jurisdiction only. It therefore has no power under the Constitution to issue a writ of mandamus to an administrative agency in the exercise of its original jurisdiction.⁷⁵

Under the Federal Rules of Civil Procedure a mandamus "order" has been substituted for the traditional "writ" of mandamus, with equivalent substantive effect.⁷⁶

decide, not a controversy growing out of duty performed under the statute, but one solely involving an alleged refusal to discharge duties which the statute exacts. Admonishing, as this does, that the issue before us is confined to a consideration of the face of the statute and the non-action of the Commission in a matter purely ministerial, it serves also to furnish a ready solution of the question to be decided, since it brings out in bold contrast the direct and express command of the statute to the Commission, to act concerning the subject in hand, and the Commission's unequivocal refusal to obey such command." (Mr. Chief Justice White in *United States ex rel. Kansas City Southern Ry. Co. v. Interstate Commerce Commission* (1920) 252 U. S. 178, 187, 64 L. Ed. 517, 40 S. Ct. 187.)

⁷² See § 8 et seq.

⁷³ "Mandamus issues to compel an officer to perform a purely ministerial duty. It can not be used to compel or control a duty in the discharge of which by law he is given discretion. The duty may be discretionary within

limits. He can not transgress those limits, and if he does so, he may be controlled by injunction or mandamus to keep within them. The power of the court to intervene, if at all, thus depends upon what statutory discretion he has." (Mr. Chief Justice Taft in *Work v. United States ex rel. Rives* (1925) 267 U. S. 175, 177, 69 L. Ed. 561, 45 S. Ct. 252.)

⁷⁴ See § 614.

⁷⁵ *Marbury v. Madison* (1803) 1 Cranch (5 U. S.) 137, 2 L. Ed. 60.

⁷⁶ Rule 81 (b) of the Federal Rules of Civil Procedure:

"Rule 81. Applicability in General

"(b) *Scire Facias* and *Mandamus*.

The writs of *scire facias* and *mandamus* are abolished. Relief heretofore available by *mandamus* or *scire facias* may be obtained by appropriate action or by appropriate motion under the practice prescribed in these rules."

George Allison & Co. v. Interstate Commerce Commission (1939) 70 App. D. C. 375, 107 F. (2d) 180, cert. den. 309 U. S. 656, 84 L. Ed. 1005, 60 S. Ct. 470.

The petitioner must be the real party in interest.⁷⁷

Remand to an administrative agency is similar in purpose and effect to the granting of mandamus. Both require the agency to perform a duty within the administrative or legislative sphere, required by the law.⁷⁸

§ 689. A Remedy to Enforce Ministerial Duty.

Mandamus is the appropriate remedy to compel an administrative agency to perform a ministerial duty.⁷⁹ Whether mandamus will

⁷⁷ *United States ex rel. Greathouse v. Hurley* (1933) 61 App. D. C. 360, 63 F. (2d) 137, aff'd 289 U. S. 352, 77 L. Ed. 1250, 53 S. Ct. 614.

⁷⁸ See § 788 et seq.

⁷⁹ Administrator of Veterans' Affairs.

United States ex rel. Simons v. Hines (1934) 63 App. D. C. 55, 69 F. (2d) 229; *Hines v. United States ex rel. Cavanagh* (1930) 59 App. D. C. 267, 39 F. (2d) 517.

Board of Tax Appeals.

Board of Tax Appeals v. United States ex rel. Shults Bread Co. (1929) 59 App. D. C. 161, 37 F. (2d) 442, cert. den. 281 U. S. 731, 74 L. Ed. 1147, 50 S. Ct. 246; *United States ex rel. Dasecomb v. Board of Tax Appeals* (1926) 56 App. D. C. 392, 16 F. (2d) 337.

Chief of Finance of the Army.

* *Miguel v. McCarl* (1934) 291 U. S. 442, 78 L. Ed. 901, 54 S. Ct. 465.

Civil Service Commission.

United States ex rel. Stowell v. Deming (1927) 57 App. D. C. 223, 19 F. (2d) 697, cert. den. 275 U. S. 531, 72 L. Ed. 410, 48 S. Ct. 28.

Comptroller General.

* *Miguel v. McCarl* (1934) 291 U. S. 442, 78 L. Ed. 901, 54 S. Ct. 465.

Interstate Commerce Commission.

United States v. Los Angeles & S. L. R. Co. (1927) 273 U. S. 299, 71 L. Ed. 651, 47 S. Ct. 413; *Interstate Commerce Commission v. United States ex rel. Waste Merchants Ass'n* (1922) 260 U. S. 32, 67 L. Ed. 112, 43 S. Ct.

6; * *United States ex rel. Kansas City Southern Ry. Co. v. Interstate Commerce Commission* (1920) 252 U. S. 178, 64 L. Ed. 517, 40 S. Ct. 187;

* *United States ex rel. Louisville Cement Co. v. Interstate Commerce Commission* (1918) 246 U. S. 638, 62 L. Ed. 914, 38 S. Ct. 408; * *Interstate Commerce Commission v. United States ex rel. Humboldt S. S. Co.* (1912) 224 U. S. 474, 56 L. Ed. 849, 32 S. Ct. 556; *United States ex rel. Maine Potato Growers & Shippers Ass'n v. Interstate Commerce Commission* (1937) 66 App. D. C. 398, 88 F. (2d) 780; *United States ex rel. Kansas City Southern Ry. Co. v. Interstate Commerce Commission* (1938) 68 App. D. C. 396, 98 F. (2d) 268, cert. den. 305 U. S. 625, 83 L. Ed. 400, 59 S. Ct. 86. See also *Interstate Commerce Commission v. United States ex rel. Los Angeles* (1929) 280 U. S. 52, 74 L. Ed. 163, 50 S. Ct. 53.

National Mediation Board.

Virginian Ry. Co. v. System Federation, R. E. D. (1937) 300 U. S. 515, 81 L. Ed. 789, 57 S. Ct. 592. See *Grand International Brotherhood of Locomotive Engineers v. Morphy* (C. C. A. 2d, 1940) 109 F. (2d) 576.

Postmaster-General.

* *Kendall v. United States* (1838) 12 Pet. (37 U. S.) 524, 9 L. Ed. 1181.

Secretary of the Interior.

Wilbur v. United States ex rel. Krushnie (1930) 280 U. S. 306, 74 L. Ed. 445, 50 S. Ct. 103; * *Wilbur v.*

issue depends upon whether an agency is right in refusing to act.⁸⁰ Ordinarily mandamus against a public officer will not lie unless the

United States ex rel. Kadrie (1930) 281 U. S. 206, 74 L. Ed. 809, 50 S. Ct. 320; * *Work v. United States ex rel. Rives* (1925) 267 U. S. 175, 69 L. Ed. 561, 45 S. Ct. 252; *Lane v. Hoglund* (1917) 244 U. S. 174, 61 L. Ed. 1066, 37 S. Ct. 558; *Ballinger v. United States ex rel. Frost* (1910) 216 U. S. 240, 54 L. Ed. 464, 30 S. Ct. 338; *Garfield v. United States ex rel. Goldsby* (1908) 211 U. S. 249, 53 L. Ed. 168, 29 S. Ct. 62; *United States ex rel. Dunlap v. Black* (1888) 128 U. S. 40, 32 L. Ed. 354, 9 S. Ct. 12; *United States ex rel. McBride v. Schurz* (1880) 102 U. S. 378, 26 L. Ed. 167; *Litchfield v. Richards* (1870) 9 Wall. (76 U. S.) 575, 19 L. Ed. 681; *Gaines v. Thompson* (1868) 7 Wall. (74 U. S.) 347, 19 L. Ed. 62; *United States ex rel. United States Borax Co. v. Ickes* (1938) 68 App. D. C. 399, 98 F. (2d) 271, cert. den. 305 U. S. 619, 83 L. Ed. 395, 59 S. Ct. 80.

Secretary of the Navy.

Decatur v. Paulding (1840) 14 Pet. (39 U. S.) 497, 10 L. Ed. 559.

Secretary of State.

See *Marbury v. Madison* (1803) 1 Cranch (5 U. S.) 137, 2 L. Ed. 60.

Secretary of the Treasury.

United States ex rel. Parish v. MacVeagh (1909) 214 U. S. 124, 53 L. Ed. 936, 29 S. Ct. 556.

Secretary of War.

* *United States ex rel. Greathouse v. Dern* (1933) 289 U. S. 352, 77 L. Ed. 1250, 53 S. Ct. 614; *Lowry v. Woodring* (1938) 69 App. D. C. 348, 101 F. (2d) 673, cert. den. 306 U. S. 654, 83 L. Ed. 1052, 59 S. Ct. 643.

Superintendent of Licenses (District of Columbia).

Coombe v. United States ex rel. Selis (1925) 55 App. D. C. 190, 3 F. (2d) 714.

Tariff Commission.

See *United States ex rel. Norwegian Nitrogen Products Co. v. United States Tariff Commission* (1927) 274 U. S. 106, 71 L. Ed. 949, 47 S. Ct. 499. **Treasurer of the United States.**

Roberts v. United States ex rel. Valentine (1900) 176 U. S. 221, 44 L. Ed. 443, 20 S. Ct. 376.

Quotations.

"2. While the decisions of this Court exhibit a reluctance to direct a writ of mandamus against an executive officer, they recognize the duty to do so by settled principles of law in some cases. *Lane v. Hoglund*, 244 U. S. 174, 181, and cases cited. In *Roberts v. United States*, 176 U. S. 221, 231, referred to and quoted in the *Hoglund* case, this Court said:

"Every statute to some extent requires construction by the public officer whose duties may be defined therein. Such officer must read the law, and he must therefore, in a certain sense, construe it, in order to form a judgment from its language what duty he is directed by the statute to perform. But that does not necessarily and in all cases make the duty of the officer anything other than a purely ministerial one. If the law direct him to perform an act in regard to which no discretion is committed to him, and which, upon the facts existing, he is bound to perform, then that act is ministerial, although depending upon a statute which requires, in some degree, a construction of its language by the officer. Unless this be so, the value of this writ is very greatly impaired. Every executive officer whose duty is plainly devolved upon him by statute might refuse to perform it, and when his refusal is brought before the court he might successfully plead that the performance of the duty involved the

right of the petitioner and the duty of the officer, performance of which is to be commanded, are both clear.⁸¹ Thus the petitioner's right must be complete, and not merely inchoate. Mandamus will not lie to enforce a right which is conditional or incomplete by reason of conditions precedent which are still to be performed by the petitioner or which is contingent upon the further act of a third person or tribunal.⁸²

Mandamus reaches only the question whether the duty as it exists was discharged, not the soundness or the justice of the result.⁸³ The duty, in the discharge of which an officer is given discretion, may be discretionary within limits. He cannot transgress these limits, and if he does so, he may be controlled by injunction or mandamus to keep within them.⁸⁴ The power of the court to intervene, if at all, thus

construction of a statute by him, and therefore it was not ministerial, and the court would on that account be powerless to give relief. Such a limitation of the powers of the court, we think, would be most unfortunate, as it would relieve from judicial supervision all executive officers in the performance of their duties, whenever they should plead that the duty required of them arose upon the construction of a statute, no matter how plain its language, nor how plainly they violated their duty in refusing to perform the act required.''' (Mr. Justice Sutherland in *Wilbur v. United States ex rel. Krushnic* (1930) 280 U. S. 306, 318, 319, 74 L. Ed. 445, 50 S. Ct. 103.

"The law relating to mandamus against a public officer is well settled in the abstract, the only doubt which arises being whether the facts regarding any particular case bring it within the law which permits the writ to issue where a mere ministerial duty is imposed upon an executive officer, which duty he is bound to perform without any further question. If he refuse under such circumstances, mandamus will lie to compel him to perform his duty. This is the principle upheld by this court in *United*

States v. Black, 128 U. S. 40, and upon the authority of that case the defendant claims that no mandamus can be issued against him." (Mr. Justice Peckham in *Roberts v. United States ex rel. Valentine* (1900) 176 U. S. 221, 229, 230, 44 L. Ed. 443, 20 S. Ct. 376.)

⁸⁰ *Interstate Commerce Commission v. United States ex rel. Los Angeles* (1929) 280 U. S. 52, 74 L. Ed. 163, 50 S. Ct. 53.

⁸¹ *United States ex rel. Greathouse v. Dern* (1933) 289 U. S. 352, 77 L. Ed. 1250, 53 S. Ct. 614; *United States ex rel. Simons v. Hines* (1934) 63 App. D. C. 55, 69 F. (2d) 229; *United States ex rel. Stowell v. Deming* (1927) 57 App. D. C. 223, 19 F. (2d) 697, cert. den. 275 U. S. 531, 72 L. Ed. 410, 48 S. Ct. 28.

⁸² *United States ex rel. Greathouse v. Hurley* (1933) 61 App. D. C. 360, 63 F. (2d) 137, aff'd 289 U. S. 352, 77 L. Ed. 1250, 53 S. Ct. 614.

⁸³ *United States ex rel. Maine Potato Growers & Shippers Ass'n v. Interstate Commerce Commission* (1937) 66 App. D. C. 398, 88 F. (2d) 780.

⁸⁴ *Work v. United States ex rel. Rives* (1925) 267 U. S. 175, 69 L. Ed. 561, 45 S. Ct. 252.

depends upon the extent of the statutory discretion of the administrative agencies.⁸⁵

§ 690. Mandamus Unavailable to Control Discretion.

Mandamus has never been regarded as a proper writ to control the judgment and discretion of an officer as to the decision of a matter which the law gave him the power and imposed upon him the duty to decide for himself,⁸⁶ even though a reviewing court may feel that the agency should have decided the question differently.⁸⁷ Thus if an agency is under a ministerial duty to act by exercising its discretion in respect of a particular matter, it may be compelled by mandamus to exercise its discretion,⁸⁸ but not to exercise it in a particular way.⁸⁹ Thus mandamus does not lie to compel the retraction or

⁸⁵ *Work v. United States ex rel. Rives* (1925) 267 U. S. 175, 69 L. Ed. 561, 45 S. Ct. 252.

⁸⁶ **Wilbur v. United States ex rel. Kadrie* (1930) 281 U. S. 206, 74 L. Ed. 809, 50 S. Ct. 320.

⁸⁷ *United States ex rel. Maine Potato Growers & Shippers Ass'n v. Interstate Commerce Commission* (1937) 66 App. D. C. 398, 88 F. (2d) 780.

⁸⁸ *Miguel v. McCarl* (1934) 291 U. S. 442, 78 L. Ed. 901, 54 S. Ct. 465; *United States v. Bell* (C. C. A. 4th, 1935) 80 F. (2d) 516. See also § 695.

⁸⁹ **Board of Tax Appeals.**

Board of Tax Appeals v. United States ex rel. Shults Bread Co. (1929) 59 App. D. C. 161, 37 F. (2d) 442, cert. den. (1930) 281 U. S. 731, 74 L. Ed. 1147, 50 S. Ct. 246.

Comptroller General.

**Miguel v. McCarl* (1934) 291 U. S. 442, 78 L. Ed. 901, 54 S. Ct. 465.

Director of the Census.

United States ex rel. Atlanta v. Steuart (1931) 60 App. D. C. 83, 47 F. (2d) 979.

Director of Bureau of War Risk Insurance.

United States v. Bell (C. C. A. 4th, 1935) 80 F. (2d) 516.

Interstate Commerce Commission.

United States ex rel. Chicago, G. W. R. Co. v. Interstate Commerce Commission (1935) 294 U. S. 50, 79 L. Ed. 752, 55 S. Ct. 326, rehearing denied 294 U. S. 731, 79 L. Ed. 1261, 55 S. Ct. 504; **Interstate Commerce Commission v. United States ex rel. Campbell* (1933) 289 U. S. 385, 77 L. Ed. 1273, 53 S. Ct. 607; *Interstate Commerce Commission v. New York, N. H. & H. R. Co.* (1932) 287 U. S. 178, 77 L. Ed. 248, 53 S. Ct. 106; *Interstate Commerce Commission v. United States ex rel. Waste Merchants Ass'n* (1922) 260 U. S. 32, 67 L. Ed. 112, 43 S. Ct. 6; **Interstate Commerce Commission v. United States ex rel. Humboldt S. S. Co.* (1912) 224 U. S. 474, 56 L. Ed. 849, 32 S. Ct. 556; *United States ex rel. Kansas City Southern Ry. Co. v. Interstate Commerce Commission* (1938) 68 App. D. C. 396, 98 F. (2d) 268, cert. den. 305 U. S. 625, 83 L. Ed. 400, 59 S. Ct. 86; *United States ex rel. Kroger Grocery & Baking Co. v. Interstate Commerce Commission* (1934) 64 App. D. C. 43, 73 F. (2d) 948, cert. den. (1935) 294 U. S. 712, 79 L. Ed. 1246, 55 S. Ct. 508; *Interstate Commerce Commission v. United*

reversal of discretionary action already taken,⁹⁰ as a writ of error to an administrative agency,⁹¹ or to otherwise control the exercise of administrative discretion.⁹² Nor will it lie to destroy a lawful power

States ex rel. Arcata & M. R. R. Co. (1933) 62 App. D. C. 92, 65 F. (2d) 180, cert. den. 290 U. S. 632, 78 L. Ed. 550, 54 S. Ct. 51; Interstate Commerce Commission v. United States ex rel. Capital Grain & Feed Co. (1929) 59 App. D. C. 118, 35 F. (2d) 1012.

Secretary of the Interior and Land Department Officers.

* Wilbur v. United States ex rel. Kadrie (1930) 281 U. S. 206, 74 L. Ed. 809, 50 S. Ct. 320; * Work v. United States ex rel. Rives (1925) 267 U. S. 175, 69 L. Ed. 561, 45 S. Ct. 252; United States ex rel. Hall v. Payne (1920) 254 U. S. 343, 65 L. Ed. 295, 41 S. Ct. 131; United States ex rel. Knight v. Lane (1913) 228 U. S. 6, 57 L. Ed. 709, 33 S. Ct. 407; United States ex rel. Riverside Oil Co. v. Hitchcock (1903) 190 U. S. 316, 47 L. Ed. 1074, 23 S. Ct. 698; New Orleans v. Paine (1893) 147 U. S. 261, 37 L. Ed. 162, 13 S. Ct. 303; Marquez v. Frisbie (1879) 101 U. S. 473, 25 L. Ed. 800; Litchfield v. Richards (1870) 9 Wall. (76 U. S.) 575, 19 L. Ed. 681; United States ex rel. United States Borax Co. v. Ickes (1938) 68 App. D. C. 399, 98 F. (2d) 271, cert. den. 305 U. S. 619, 83 L. Ed. 395, 59 S. Ct. 80; Stookey v. Wilbur (1932) 61 App. D. C. 117, 58 F. (2d) 523.

Secretary of Labor.

Linklater v. Perkins (1934) 64 App. D. C. 69, 74 F. (2d) 473.

Secretary of the Navy.

Denby v. Berry (1923) 263 U. S. 29, 68 L. Ed. 148, 44 S. Ct. 74; United States ex rel. Goldberg v. Daniels (1913) 231 U. S. 218, 58 L. Ed. 191, 34 S. Ct. 84; Decatur v. Paulding (1840) 14 Pet. (39 U. S.) 497, 10 L. Ed. 559.

Secretary of the Treasury.

United States ex rel. Parish v. MacVeagh (1909) 214 U. S. 124, 53 L. Ed. 936, 29 S. Ct. 556; Caswell v. Morgenthau (1938) 69 App. D. C. 15, 98 F. (2d) 296.

⁹⁰ Miguel v. McCarl (1934) 291 U. S. 442, 78 L. Ed. 901, 54 S. Ct. 465; Wilbur v. United States ex rel. Kadrie (1930) 281 U. S. 206, 74 L. Ed. 809, 50 S. Ct. 320.

⁹¹ Interstate Commerce Commission.

Interstate Commerce Commission v. United States ex rel. Campbell (1933) 289 U. S. 385, 77 L. Ed. 1273, 53 S. Ct. 607; Interstate Commerce Commission v. United States ex rel. Waste Merchants Ass'n (1922) 260 U. S. 32, 67 L. Ed. 112, 43 S. Ct. 6; Interstate Commerce Commission v. United States ex rel. Arcata & M. R. R. Co. (1933) 62 App. D. C. 92, 65 F. (2d) 180, cert. den. 290 U. S. 632, 78 L. Ed. 550, 54 S. Ct. 51.

Secretary of the Interior.

Wilbur v. United States ex rel. Kadrie (1930) 281 U. S. 206, 74 L. Ed. 809, 50 S. Ct. 320; United States ex rel. Riverside Oil Co. v. Hitchcock (1903) 190 U. S. 316, 47 L. Ed. 1074, 23 S. Ct. 698.

⁹² Interstate Commerce Commission.

United States ex rel. Chicago, G. W. R. Co. v. Interstate Commerce Commission (1935) 294 U. S. 50, 79 L. Ed. 752, 55 S. Ct. 326, rehearing denied 294 U. S. 731, 79 L. Ed. 1261, 55 S. Ct. 504; Interstate Commerce Commission v. United States ex rel. Campbell (1933) 289 U. S. 385, 77 L. Ed. 1273, 53 S. Ct. 607; Interstate Commerce Commission v. United States ex rel. Waste Merchants Ass'n (1922) 260 U. S. 32, 67 L. Ed. 112,

because of the suggestion of a possible abuse.⁹³ It has been said that where a duty is "judicial" rather than "ministerial" it cannot be controlled by mandamus.⁹⁴

§ 691. — Discretionary Matters.

Discretion does not exist where there is no power to act except in one way.⁹⁵ But discretion is involved where the duty prescribed is not free from doubt,⁹⁶ or where a wide margin of judgment has been left to the agency as to the method of performing the duty.⁹⁷

Discretionary power is jurisdictional and the court, in determining whether or not the decision of an official of the government was within his discretion, will be guided not alone by the specific ground upon which the decision is based, but broadly by an examination of the entire record in order to ascertain whether or not the action taken can be reconciled with the law conferring jurisdiction.⁹⁸ Mandamus will not lie to compel the Secretary of the Navy to deliver property to the highest bidder. The discretion of the Secretary is not ended by the receipt and opening of the bids, even though they satisfied all the conditions prescribed.⁹⁹ It will not lie where its effect would be to cause the Interstate Commerce Commission to interpret a published tariff in a particular way.¹ Mandamus does not lie

43 S. Ct. 6; *Interstate Commerce Commission v. United States ex rel. Capital Grain & Feed Co.* (1929) 59 App. D. C. 118, 35 F. (2d) 1012. *Secretary of the Interior.*

Work v. United States ex rel. Rives (1925) 267 U. S. 175, 69 L. Ed. 561, 45 S. Ct. 252; *United States ex rel. Parish v. MacVeagh* (1909) 214 U. S. 124, 53 L. Ed. 936, 29 S. Ct. 556.

⁹³ *Wilbur v. United States ex rel. Kadrie* (1930) 281 U. S. 206, 74 L. Ed. 809, 50 S. Ct. 320.

⁹⁴ *United States ex rel. Abilene & S. Ry. Co. v. Interstate Commerce Commission* (1925) 56 App. D. C. 40, 8 F. (2d) 901, cert. den. 270 U. S. 650, 70 L. Ed. 781, 46 S. Ct. 351.

⁹⁵ *Jones v. Securities & Exchange Commission* (1936) 298 U. S. 1, 80 L. Ed. 1015, 56 S. Ct. 654.

⁹⁶ *Interstate Commerce Commission v. New York, N. H. & H. R. Co.*

(1932) 287 U. S. 178, 77 L. Ed. 248, 53 S. Ct. 106; *Wilbur v. United States ex rel. Kadrie* (1930) 281 U. S. 206, 74 L. Ed. 809, 50 S. Ct. 320. See also *Decatur v. Paulding* (1840) 14 Pet. (39 U. S.) 497, 10 L. Ed. 559.

⁹⁷ *Interstate Commerce Commission v. New York, N. H. & H. R. Co.* (1932) 287 U. S. 178, 77 L. Ed. 248, 53 S. Ct. 106.

⁹⁸ *United States ex rel. Greathouse v. Hurley* (1933) 61 App. D. C. 360, 63 F. (2d) 137, aff'd 289 U. S. 352, 77 L. Ed. 1250, 53 S. Ct. 614.

⁹⁹ *United States ex rel. Goldberg v. Daniels* (1913) 231 U. S. 218, 58 L. Ed. 191, 34 S. Ct. 84.

¹ *United States ex rel. Kroger Grocery & Baking Co. v. Interstate Commerce Commission* (1934) 64 App. D. C. 43, 73 F. (2d) 948, cert. den. (1935) 294 U. S. 712, 79 L. Ed. 1246, 55 S. Ct. 508.

to control the supervisory powers of executive officers in the administration of their departments,² or to require an executive officer to reinstate a discharged employee with back pay.³

Matters concerning which an administrative agency has discretion are of a factual nature and are administrative questions.⁴

§ 692. Ministerial Duty.

§ 693. — In General.

The criterion for determining whether a duty is ministerial is to see if its discharge involves the exercise of discretion.⁵ Where the duty in a particular situation is so plainly prescribed as to be free from doubt and equivalent to a positive command, it is regarded as being so far ministerial that its performance may be compelled by mandamus, unless there be provision or implication to the contrary.⁶

If the Interstate Commerce Commission should refuse to hear a claim for reparation,⁷ or finding reparation due, decline to order payment, mandamus would be available to hold it to its duty.⁸

The duty to issue a license may be ministerial.⁹

§ 694. — Ministerial Duty and Error of Law.

A duty is ministerial even though the ascertainment of that fact involves the construction of a controlling statute or the decision of

² *Caswell v. Morgenthau* (1938) 69 App. D. C. 15, 98 F. (2d) 296.

³ *Caswell v. Morgenthau* (1938) 69 App. D. C. 15, 98 F. (2d) 296.

⁴ See § 505 et seq.

⁵ *Lane v. Hoglund* (1917) 244 U. S. 174, 61 L. Ed. 1066, 37 S. Ct. 558. See also § 688.

⁶ *Comptroller-General*.

Miguel v. McCarl (1934) 291 U. S. 442, 78 L. Ed. 901, 54 S. Ct. 465.

Interstate Commerce Commission.

United States ex rel. Kansas City Southern Ry. Co. v. Interstate Commerce Commission (1938) 68 App. D. C. 396, 98 F. (2d) 268, cert. den. 305 U. S. 625, 83 L. Ed. 400, 59 S. Ct. 86.

Secretary of the Interior.

Wilbur v. United States ex rel. Kadrie (1930) 281 U. S. 206, 74 L.

Ed. 809, 50 S. Ct. 320; *United States ex rel. United States Borax Co. v. Ickes* (1938) 68 App. D. C. 399, 98 F. (2d) 271, cert. den. 305 U. S. 619, 83 L. Ed. 395, 59 S. Ct. 80.

⁷ *Interstate Commerce Commission v. United States ex rel. Campbell* (1933) 289 U. S. 385, 77 L. Ed. 1273, 53 S. Ct. 607.

⁸ *Interstate Commerce Commission v. United States ex rel. Campbell* (1933) 289 U. S. 385, 77 L. Ed. 1273, 53 S. Ct. 607. See *George Allison & Co. v. Interstate Commerce Commission* (1940) 70 App. D. C. 375, 107 F. (2d) 180, cert. den. 309 U. S. 656, 84 L. Ed. 1005, 60 S. Ct. 470.

⁹ *Coombe v. United States ex rel. Selis* (1925) 55 App. D. C. 190, 3 F. (2d) 714.

other judicial questions. Hence refusal to perform a ministerial duty, remediable by mandamus, may be because of an error of law as to whether a legal duty has been imposed or whether the agency has power to act.¹⁰

But not every error of law results in failure to perform a ministerial duty, and the two should not be confused. Errors of law in the discharge of a function essentially judicial are not subject to be corrected through mandamus any more than errors of fact.¹¹ That is to say, if the matter is discretionary mandamus may not be a remedy even if the administrative action taken is based on an erroneous construction of a statute. The fact that the wrong reason is given is no ground for mandamus if the agency is within its discretion.¹²

However, where it is claimed that a statute, properly construed no matter what difficulties be inherent in construction, would place an agency under a ministerial duty, it must first be determined whether private rights are affected.¹³ If private rights are affected judicial

10 Interstate Commerce Commission.

Interstate Commerce Commission v. United States ex rel. Los Angeles (1929) 280 U. S. 52, 74 L. Ed. 163, 50 S. Ct. 53; *Interstate Commerce Commission v. United States ex rel. Humboldt S. S. Co.* (1912) 224 U. S. 474, 56 L. Ed. 849, 32 S. Ct. 556.

Patent Office.

But see *Wigton v. Coe* (1934) 62 App. D. C. 367, 68 F. (2d) 414, cert. den. 291 U. S. 677, 78 L. Ed. 1065, 54 S. Ct. 528.

Secretary of the Interior.

Borax Consolidated v. Los Angeles (1935) 296 U. S. 10, 80 L. Ed. 9, 56 S. Ct. 23; *Wilbur v. United States ex rel. Krushnic* (1930) 280 U. S. 306, 74 L. Ed. 445, 50 S. Ct. 103; *Work v. United States ex rel. Rives* (1925) 267 U. S. 175, 69 L. Ed. 561, 45 S. Ct. 252; *Lane v. Hoglund* (1917) 244 U. S. 174, 61 L. Ed. 1066, 37 S. Ct. 558.

State Agencies.

See *Delaware River Joint Toll Bridge Commission v. Colburn* (1940) 310 U. S. 419, 84 L. Ed. 1287, 60 S. Ct. 1039.

Treasurer of the United States.

Roberts v. United States ex rel. Valentine (1900) 176 U. S. 221, 44 L. Ed. 443, 20 S. Ct. 376.

¹¹ *Interstate Commerce Commission v. United States ex rel. Campbell* (1933) 289 U. S. 385, 77 L. Ed. 1273, 53 S. Ct. 607.

¹² *Denby v. Berry* (1923) 263 U. S. 29, 68 L. Ed. 148, 44 S. Ct. 74. This, however, is an objection to the remedy of mandamus, not to an appropriate method of judicial review.

¹³ "This court has at all times been careful to guard itself against an invasion of the functions confided by law to other departments of the government, and in reference to the proceedings before the officers intrusted with the charge of selling the public lands it has frequently and firmly refused to interfere with them in the discharge of their duties, either by mandamus or injunction, so long as the title remained in the United States and the matter was rightfully before those officers for decision. On the other hand, it has constantly as-

construction is required, and the agency must be commanded to perform any ministerial duty found to exist. But if private rights are not affected, as in bounty or gratuity cases, there is no right to judicial construction, the administrative interpretation of the statute is conclusive, and mandamus must be denied.¹⁴ The matter of private

serted the right of the proper courts to inquire, after the title had passed from the government, and the question became one of private right, whether, according to the established rules of equity and the acts of Congress concerning the public lands, the party holding that title should hold absolutely as his own, or as trustee for another. And we are satisfied that the relations thus established between the courts and the land department are not only founded on a just view of the duties and powers of each, but are essential to the ends of justice and to a sound administration of the law." (Mr. Justice Miller in *Johnson v. Towsley* (1871) 13 Wall. (80 U. S.) 72, 87, 20 L. Ed. 485.)

See also § 187 et seq.

14 "We are asked to reject this interpretation as wholly at variance with the natural and necessary meaning of the words and to confirm the courts below in enforcing a view more liberal to the claimant.

"The above summary of section 5 clearly shows that Congress was seeking to save the beneficiaries from losses which it would have been under no legal obligation to make good if a private person. It was a gratuity based on equitable and moral considerations. *United States v. Realty Company*, 163 U. S. 427, 439; *Allen v. Smith*, 173 U. S. 389, 402. Congress did not wish to create a legal claim. It was not dealing with vested rights. It did not, as it did with the claims for supplies and services directly furnished the Government un-

der the first and second sections of the Act, make the losses recoverable in a court, but expressly provided otherwise. It dealt with the subject with the utmost caution. It hedged the granting of the equitable gratuity with limitations to prevent the use of the statute for the recovery of doubtful or fraudulent claims or merely speculative losses. It vested the Secretary with power to reject all losses except as he was satisfied that they were just and equitable and it made his decision conclusive and final. Final against whom? Against the claimant. He could not resort to court to review the Secretary's decision. This was expressly forbidden.

* * *

"Congress was occupying toward the proposed beneficiaries of section 5 the attitude rather of a benefactor, than of a debtor at law. Congress intended the Secretary to act for it, and to construe the meaning of the words used to describe the elements of the net losses to be ascertained and to give effect to his interpretation without the intervention of the courts. This statute presents a case of as wide discretion as was held to have been vested in the Secretary of the Navy in the *Decatur Case*." (Mr. Chief Justice Taft in *Work v. United States ex rel. Rives* (1925) 267 U. S. 175, 181, 182, 69 L. Ed. 561, 45 S. Ct. 252.)

"Undoubtedly there has been in all of them some special ground for the exercise of the equitable jurisdiction, for this court does not and never has asserted that all the matters passed

rights is thus all important in mandamus cases,¹⁵ as elsewhere in judicial review.^{15a}

But the profound differences in result required by this controlling criterion have not always been clearly appreciated by the courts, due

upon by the land office are open to review in the courts. On the contrary, it is fully conceded that when those officers decide controverted questions of fact, in the absence of fraud, or impositions, or mistake, their decision on those questions is final, except as they may be reversed on appeal in that department. But we are not prepared to concede that when, in the application of the facts as found by them they, by misconstruction of the law, take from a party that to which he has acquired a legal right under the sanction of those laws, the courts are without power to give any relief." (Mr. Justice Miller in *Johnson v. Towsley* (1871) 13 Wall. (80 U. S.) 72, 86, 20 L. Ed. 485.)

See also *United States ex rel. Empire & S. Ry. Co. v. Interstate Commerce Commission* (1930) 59 App. D. C. 391, 45 F. (2d) 293, cert. den. 283 U. S. 834, 75 L. Ed. 1446, 51 S. Ct. 483.

15 "That the action of the land office in issuing a patent for any of the public land, subject to sale by pre-emption or otherwise, is conclusive of the legal title, must be admitted under the principle above stated, and in all courts, and in all forms of judicial proceedings, where this title must control, either by reason of the limited powers of the court, or the essential character of the proceeding, no inquiry can be permitted into the circumstances under which it was obtained. On the other hand there has always existed in the courts of equity the power in certain classes of cases to inquire into and correct mistakes, injustice, and wrong in both judicial and executive

action, however solemn the form which the result of that action may assume, when it invades private rights; and by virtue of this power the final judgments of courts of law have been annulled or modified, and patents and other important instruments issuing from the crown, or other executive branch of the government, have been corrected or declared void, or other relief granted. No reason is perceived why the action of the land office should constitute an exception to this principle." (Mr. Justice Miller in *Johnson v. Towsley* (1871) 13 Wall. (80 U. S.) 72, 83, 84, 20 L. Ed. 485.)

"*Ness v. Fisher*, 223 U. S. 683; *Riverside Oil Company v. Hitchcock*, 190 U. S. 316; *Alaska Smokeless Company v. Lane*, 250 U. S. 549; and *Hall v. Payne*, 254 U. S. 343, were all cases in which it was sought to control and reverse rulings of the Secretary of the Interior, on the ground that he had in the administration of the land laws made a ruling contrary to law against an applicant for action by him. In each case it was held that as the statute intended to vest in the Secretary the discretion to construe the land laws and make such rulings, no court could reverse or control them by mandamus in the absence of anything to show that they were capricious or arbitrary. It was pointed out that a mandamus could not be made to serve the function of a writ of error, and the mere fact that the court might deem the ruling erroneous in law gave it no power to intervene. These cases are supported by earlier authorities to the same effect. *United States ex rel. Tucker v. Seaman*, 17 How. 225; *Gaines v. Thompson*, 7

to the fact that the criterion itself was seldom accorded articulate recognition in the early opinions. This led to confusion in some of the later cases, and some statement of a rule to the effect that, if an administrative construction of the statute is not clearly wrong, mandamus will not lie. These cases are reconcilable because in effect they construe the statute as vesting discretionary power in the agency.¹⁶ But since a case or controversy requiring exercise of the judicial power is presented by petition for a writ of mandamus where private rights are affected, such statutes should receive a definitive judicial construction, and the mandamus prayed should be granted or denied depending upon whether the judicial construction discloses the requisite ministerial duty. The importance of this result is reemphasized

Wall. 347; *Litchfield v. Register and Receiver*, 9 Wall. 575; *United States ex rel. Dunlap v. Black*, 128 U. S. 40. All rest upon the *Decatur Case*. Compare *United States v. Babcock*, 250 U. S. 328, 331. There is nothing in the award by the Secretary in the case at bar which would justify characterizing it as arbitrary or capricious or fraudulent or an abuse of discretion. The Secretary's view that it was not just or equitable to include loss by a land purchase within the gratuity of the Government as defined by the statute must therefore prevail against mandamus.

"*Lane v. Hoglund*, 244 U. S. 174, *Ballinger v. Frost*, 216 U. S. 240, *Garfield v. Goldsby*, 211 U. S. 249, *Roberts v. United States*, 176 U. S. 221, *Butterworth v. Hoe*, 112 U. S. 50, *United States v. Schurz*, 102 U. S. 378, were all cases in which the court found that all the conditions had been fulfilled upon which the relator in the mandamus was entitled to call upon the officer to do an act beneficial to the relator and that the act was thus a ministerial duty, as in the *Kendall Case*." (Mr. Chief Justice Taft in *Work v. United States ex rel. Rives* (1925) 267 U. S. 175, 183, 69 L. Ed. 561, 45 S. Ct. 252.)

^{15a} See § 187 et seq.

¹⁶ *Interstate Commerce Commission*.

United States ex rel. Chicago, G. W. R. Co. v. Interstate Commerce Commission (1935) 294 U. S. 50, 79 L. Ed. 752, 55 S. Ct. 326, rehearing denied 294 U. S. 731, 79 L. Ed. 1261, 55 S. Ct. 504; *Interstate Commerce Commission v. New York, N. H. & H. R. Co.* (1932) 287 U. S. 178, 77 L. Ed. 248, 53 S. Ct. 106. See *United States ex rel. Kansas City Southern Ry. Co. v. Interstate Commerce Commission* (1938) 68 App. D. C. 396, 98 F. (2d) 268, cert. den. 305 U. S. 625, 83 L. Ed. 400, 59 S. Ct. 86.

Secretary of the Interior.

Wilbur v. United States ex rel. Kadrie (1930) 281 U. S. 206, 74 L. Ed. 809, 50 S. Ct. 320; *United States ex rel. Hall v. Payne* (1920) 254 U. S. 343, 65 L. Ed. 295, 41 S. Ct. 131.

General References.

Early cases indicated that questions of statutory construction should be administrative questions. See *United States ex rel. Riverside Oil Co. v. Hitchcock* (1903) 190 U. S. 316, 47 L. Ed. 1074, 23 S. Ct. 698; *United States ex rel. Dunlap v. Black* (1888) 128 U. S. 40, 32 L. Ed. 354, 9 S. Ct. 12. But as pointed out above, such questions are now clearly recognized as judicial questions where private rights are affected. See § 449 et seq.

where mandamus, as so frequently happens, is the only remedy available.

Mandamus will obviously not lie where the agency makes no error of law, and the petitioner does. Thus an action in mandamus to compel a state officer to license petitioner's business without compliance with statutory provisions alleged by petitioner to be unconstitutional, will not lie where the provisions attacked are constitutional.¹⁷

§ 695. — To Take Jurisdiction.

An administrative agency can be compelled by mandamus to act in a matter with respect to which it may have jurisdiction or authority, although the court will not assume to control or guide the exercise of their authority.¹⁸ An agency's refusal to take jurisdiction may be

¹⁷ Leonard v. Earle (1929) 279 U. S. 392, 73 L. Ed. 754, 49 S. Ct. 372 (state agency).

¹⁸ Board of Tax Appeals.

United States ex rel. Dascomb v. Board of Tax Appeals (1926) 56 App. D. C. 392, 16 F. (2d) 337.

Interstate Commerce Commission.

* United States ex rel. Louisville Cement Co. v. Interstate Commerce Commission (1918) 246 U. S. 638, 62 L. Ed. 914, 38 S. Ct. 408; * Interstate Commerce Commission v. United States ex rel. Humboldt S. S. Co. (1912) 224 U. S. 474, 56 L. Ed. 849, 32 S. Ct. 556. See Interstate Commerce Commission v. United States ex rel. Waste Merchants Ass'n (1922) 260 U. S. 32, 67 L. Ed. 112, 43 S. Ct. 6.

National Mediation Board.

Virginian Ry. Co. v. System Federation, R. E. D. (1937) 300 U. S. 515, 81 L. Ed. 789, 57 S. Ct. 592.

Quotations.

"There is a class of cases in which a relator in mandamus has successfully sought to compel action by an officer who has discretion concededly conferred on him by law. The relator in such cases does not ask for a decision any particular way but only that it be made one way or the other. Such are Louisville Cement Company

v. Interstate Commerce Commission, 246 U. S. 638, and Interstate Commerce Commission v. Humboldt S. S. Company, 224 U. S. 474. They follow the decision in Commissioner of Patents v. Whitely, 4 Wall. 522. They are analogous to Hohorst, Petitioner, 150 U. S. 653; Parker, Petitioner, 131 U. S. 221; Ex parte Parker, 120 U. S. 737, and others which hold that mandamus may issue to an inferior judicial tribunal if it refuses to take jurisdiction when by law it ought to do so, or where, having obtained jurisdiction, it refuses to proceed in its exercise." (Mr. Chief Justice Taft in Work v. United States ex rel. Rives (1925) 267 U. S. 175, 184, 69 L. Ed. 561, 45 S. Ct. 252.)

"That the Supreme Court of the District of Columbia, in a proper case, has power to direct the Commission by mandamus to entertain and proceed to adjudicate a cause which it has erroneously declared to be not within its jurisdiction is decided in Interstate Commerce Commission v. Humboldt Steamship Co., 224 U. S. 474." (Mr. Justice Clarke in United States ex rel. Louisville Cement Co. v. Interstate Commerce Commission (1918) 246 U. S. 638, 642, 643, 62 L. Ed. 914, 38 S. Ct. 408.)

"It is next contended by the Com-

accomplished by refusal to act after hearing, or by dismissal of a complaint.¹⁹ The rule is the same as that controlling the issuance of mandamus to compel a court to take jurisdiction.²⁰ However, it has been held that the refusal of the agency to take jurisdiction must be plainly erroneous so as to constitute failure to perform a ministerial duty.²¹

Likewise, where an agency has improperly retained jurisdiction of a case, its action may be corrected by writ of mandamus.²²

§ 696. — To Receive Evidence.

Mandamus will lie to compel the receipt of evidence by an administrative agency where the duty to admit it is clear.²³ Thus where a statute requires consideration of particular elements in the making of an administrative determination, the agency is under a ministerial

mission that 'mandamus is not a proper proceeding to correct an error of law like that alleged in the petition.'

"The general principle which controls the issue of a writ of mandamus is familiar. It can be issued to direct the performance of a ministerial act, but not to control discretion. It may be directed against a tribunal or one who acts in a judicial capacity to require it or him to proceed, the manner of doing so being left to its or his discretion. It is true there may be a jurisdiction to determine the possession of jurisdiction. *Ex parte Harding*, 219 U. S. 363. But the full doctrine of that case cannot be extended to administrative officers. The Interstate Commerce Commission is purely an administrative body. It is true it may exercise and must exercise *quasi* judicial duties, but its functions are defined and, in the main, explicitly directed by the act creating it. It may act of its own motion in certain instances—it may be petitioned to move by those having rights under the act. It may exercise judgment and discretion, and, it may be, cannot be controlled in either. But if it absolutely refuse to act, deny its power, from a

misunderstanding of the law, it cannot be said to exercise discretion. Give it that latitude and yet give it the power to nullify its most essential duties, and how would its non-action be reviewed? The answer of the Commission is, by 'a reversal by the tribunal of appeal.' And such a tribunal, it is intimated, is the United States Commerce Court." (Mr. Justice McKenna in *Interstate Commerce Commission v. Humboldt S. S. Co.* (1912) 224 U. S. 474, 484, 56 L. Ed. 849, 32 S. Ct. 556.)

¹⁹ *United States ex rel. Chicago, G. W. R. Co. v. Interstate Commerce Commission* (1935) 294 U. S. 50, 79 L. Ed. 752, 55 S. Ct. 326.

²⁰ See *Ex parte Roe* (1914) 234 U. S. 70, 58 L. Ed. 1217, 34 S. Ct. 722.

²¹ *United States ex rel. Chicago, G. W. R. Co. v. Interstate Commerce Commission* (1935) 294 U. S. 50, 79 L. Ed. 752, 55 S. Ct. 326.

²² See *Grand International Brotherhood of Locomotive Engineers v. Morphy* (C. C. A. 2d, 1940) 109 F. (2d) 576.

²³ * *United States ex rel. Kansas City Southern R. Co. v. Interstate Commerce Commission* (1920) 252 U. S. 178, 64 L. Ed. 517, 40 S. Ct. 187.

duty, enforceable by mandamus, to receive evidence pertaining to those elements.²⁴ There is no such duty where the administrative hearing has terminated and the agency is under no duty to revive the proceeding.²⁵

§ 697. — To Make Findings.

The Valuation Act²⁶ requires that investigation and study be made of the properties of each of the rail carriers. In directing the Commission to investigate the value of this property, Congress prescribed in detail the subjects on which findings should be made, and constituted the "final valuations"²⁷ and "the classification thereof as *"prima facie* evidence" in controversies under the Act to Regulate Commerce.²⁸ Every party in interest is, therefore, entitled to have and to use this evidence; and the carrier, being a party in interest, has the remedy by mandamus to compel the commission to make a finding on each of the subjects specifically prescribed.²⁹ But Congress did not confer upon the courts power to direct what the commission shall find.³⁰

Administrative agencies are under a ministerial duty to make findings from the evidence relevant to the issues before them, which duty should be enforceable by mandamus.³¹ Obviously, however, an agency cannot be compelled to make a finding in a particular way from disputed evidence.

§ 698. Equitable Principles Control.

Although the remedy by mandamus is a legal remedy, its allowance is controlled by equitable principles, and it may be refused for reasons

²⁴ United States ex rel. Kansas City Southern R. Co. v. Interstate Commerce Commission (1920) 252 U. S. 178, 64 L. Ed. 517, 40 S. Ct. 187. See United States ex rel. Maine Potato Growers & Shippers Ass'n v. Interstate Commerce Commission (1937) 66 App. D. C. 398, 88 F. (2d) 780, cert. den. 300 U. S. 684, 81 L. Ed. 886, 57 S. Ct. 754.

²⁵ United States ex rel. Norwegian Nitrogen Products Co. v. United States Tariff Commission (1927) 274 U. S. 106, 71 L. Ed. 949, 47 S. Ct. 499.

²⁶ 49 USCA 19a.

²⁷ Which are not reviewable orders, United States v. Los Angeles & S. L. R. Co. (1927) 273 U. S. 299, 71 L. Ed. 651, 47 S. Ct. 413.

²⁸ 49 USCA 1 et seq.

²⁹ United States v. Los Angeles & S. L. R. Co. (1927) 273 U. S. 299, 71 L. Ed. 651, 47 S. Ct. 413.

³⁰ United States v. Los Angeles & S. L. R. Co. (1927) 273 U. S. 299, 71 L. Ed. 651, 47 S. Ct. 413.

³¹ See §§ 8, 550 et seq.

comparable to those which would lead a court of equity, in the exercise of a sound discretion, to withhold its protection of an undoubted legal right.³² It is an extraordinary remedial process which is awarded, not as a matter of right, but in the exercise of a sound judicial discretion. It issues to remedy a wrong, not to promote one; to compel the performance of a duty which ought to be performed, not to direct an act which will work a public or private mischief or will be within the strict letter of the law but in disregard of its spirit.³³ Thus the extraordinary remedy by mandamus may be refused where it would be burdensome to the government without any substantially equivalent benefit or advantage to the petitioners or their vendee.³⁴ The court, in its discretion, may refuse mandamus to compel the doing of an idle act,³⁵ or to give a remedy which would work a public injury or embarrassment, just as in its sound discretion a court of equity may refuse to enforce or protect legal rights, the exercise of which may be prejudicial to the public interest.³⁶ And mandamus will not be granted to those who do not come into court with clean hands.³⁷

The fact that the petitioner has a remedy at law in the Court of Claims is no bar to a mandamus suit to compel the payment of money by a government officer.³⁸

32 Civil Service Commission.

United States ex rel. Stowell v. Deming (1927) 57 App. D. C. 223, 19 F. (2d) 697, cert. den. 275 U. S. 531, 72 L. Ed. 410, 48 S. Ct. 28.

Public Utilities Commission (District of Columbia).

United States ex rel. Arlington & F. Auto R. Co. v. Elgen (1938) 68 App. D. C. 392, 98 F. (2d) 264.

Secretary of the Interior.

Duncan Townsite Co. v. Lane (1917) 245 U. S. 308, 62 L. Ed. 309, 38 S. Ct. 99; United States ex rel. Turner v. Fisher (1911) 222 U. S. 204, 56 L. Ed. 165, 32 S. Ct. 37.

Secretary of War.

United States ex rel. Greathouse v. Dern (1933) 289 U. S. 352, 77 L. Ed. 1250, 53 S. Ct. 614.

33 Duncan Townsite Co. v. Lane (1917) 245 U. S. 308, 62 L. Ed. 309, 38 S. Ct. 99.

34 United States ex rel. Greathouse v. Dern (1933) 289 U. S. 352, 77 L. Ed. 1250, 53 S. Ct. 614.

35 United States ex rel. Greathouse v. Dern (1933) 289 U. S. 352, 77 L. Ed. 1250, 53 S. Ct. 614; **United States ex rel. Turner v. Fisher** (1911) 222 U. S. 204, 56 L. Ed. 165, 32 S. Ct. 37.

36 United States ex rel. Greathouse v. Dern (1933) 289 U. S. 352, 77 L. Ed. 1250, 53 S. Ct. 614; **United States ex rel. Stowell v. Deming** (1927) 57 App. D. C. 223, 19 F. (2d) 697, cert. den. 275 U. S. 531, 72 L. Ed. 410, 48 S. Ct. 28.

37 United States ex rel. Turner v. Fisher (1911) 222 U. S. 204, 56 L. Ed. 165, 32 S. Ct. 37.

38 Miguel v. McCarl (1934) 291 U. S. 442, 78 L. Ed. 901, 54 S. Ct. 465. **But see Macfadden Publications, Inc. v. Federal Trade Commission** (1930) 59 App. D. C. 192, 37 F. (2d) 822.

§ 699. — Absence of Other Remedy.

The absence of other remedy does not alone provide a ground for issuance of the writ.³⁹ A dissatisfied complainant cannot escape the limitations upon direct review indirectly by broadening the functions of mandamus.⁴⁰ Previous attempts to secure mandamus were sometimes prompted by the now extinct "negative order" rule.⁴¹

§ 700. Pleading: Use of Amended Petition.

Where broader relief than appropriate is sought in a petition for a mandamus order, the court need not grant limited relief unless the petition is appropriately amended.⁴²

§ 701. Necessary Parties.

A mere agent, although he might have been joined as a proper party, is not an indispensable party to a suit to compel his superior to do a ministerial duty,⁴³ nor is the United States a necessary party to a suit to compel the payment of funds under an Act of Congress. The suit is maintainable without its consent.⁴⁴ While successor members of a continuous body, such as a commission, can be substituted in a mandamus suit, such a suit to compel an officer to act is personal, and substitution is permissible only when allowed by statute, decision, or practice.⁴⁵

§ 702. State Courts May Not Direct Mandamus to Federal Officers.

A state court has no power to issue mandamus directed to an officer of the United States.⁴⁶ *A fortiori*, it is not within the power or juris-

³⁹ United States ex rel. Chicago, G. W. R. Co. v. Interstate Commerce Commission (1935) 294 U. S. 50, 79 L. Ed. 752, 55 S. Ct. 326; United States ex rel. Riverside Oil Co. v. Hitchcock (1903) 190 U. S. 316, 47 L. Ed. 1074, 23 S. Ct. 698; United States ex rel. Kansas City Southern Ry. Co. v. Interstate Commerce Commission (1938) 68 App. D. C. 396, 98 F. (2d) 268, cert. den. 305 U. S. 625, 83 L. Ed. 400, 59 S. Ct. 86.

⁴⁰ Interstate Commerce Commission v. United States ex rel. Campbell (1933) 289 U. S. 385, 77 L. Ed. 1273, 53 S. Ct. 607.

⁴¹ See Interstate Commerce Com-

mission v. United States ex rel. Campbell (1933) 289 U. S. 385, 77 L. Ed. 1273, 53 S. Ct. 607. See also § 205.

⁴² United States v. Louisville & N. R. Co. (1915) 236 U. S. 318, 59 L. Ed. 598, 35 S. Ct. 363.

⁴³ Miguel v. McCarl (1934) 291 U. S. 442, 78 L. Ed. 901, 54 S. Ct. 465.

⁴⁴ Miguel v. McCarl (1934) 291 U. S. 442, 78 L. Ed. 901, 54 S. Ct. 465.

⁴⁵ See § 719 et seq.

⁴⁶ M'Clung v. Silliman (1821) 6 Wheat. (19 U. S.) 598, 5 L. Ed. 340;

* Ex parte Shockley (D. C. N. D. Ohio, E. Div., 1926) 17 F. (2d) 133.

diction of a state court, by mandamus or otherwise, to order an officer or agent of the United States to perform a duty not vested in him by law, or to perform an act against the orders of his superior.⁴⁷ Where an officer or agent of the United States has refused to obey such mandamus, and has been imprisoned for contempt of the state court, habeas corpus in the federal court is his remedy.⁴⁸

B. Prohibition

§ 703. In General.

Prohibition and injunction are somewhat similar remedies.⁴⁹ The writ of prohibition issues only in cases of extreme necessity. It is a principle of universal application, and one which lies at the very foundation of the law of prohibition, that the jurisdiction is strictly confined to cases where no other remedy exists; and it is always a sufficient reason for withholding the writ, that the party aggrieved has another and complete remedy at law.⁵⁰ Habeas corpus proceedings constitute such an adequate remedy.⁵¹

The power of the Supreme Court to issue writs of prohibition has never been clearly defined by statute⁵² or decision.⁵³ And the existence of the power, as for example, to prohibit a legislative court from entertaining an appeal from an administrative agency is not free from doubt.⁵⁴ Where there is no tenable basis for exercising the power to issue the writ, it is common practice to pass the question of power and to deny the writ because without warrant in other respects.⁵⁵

C. Injunction

§ 704. In General.

This subdivision deals with suits to enjoin an administrative agency from performing an act. Suits to enjoin enforcement of, suspend, annul or set aside an administrative order are treated elsewhere.⁵⁶

⁴⁷ * *Ex parte Shockley* (D. C. N. D. Ohio, E. Div., 1926) 17 F. (2d) 133.

⁴⁸ *Ex parte Shockley* (D. C. N. D. Ohio, E. Div., 1926) 17 F. (2d) 133.

⁴⁹ See § 704.

⁵⁰ *Kabadian v. Doak* (1933) 62 App. D. C. 114, 65 F. (2d) 202, cert. den. 290 U. S. 661, 78 L. Ed. 572, 54 S. Ct. 76.

⁵¹ *Kabadian v. Doak* (1933) 62 App. D. C. 114, 65 F. (2d) 202, cert. den. 290 U. S. 661, 78 L. Ed. 572, 54 S. Ct. 76.

⁵² See Rev. Stat. §§ 688, 716, 28

USCA 342, 377.

⁵³ *Ex parte Bakelite Corp.* (1929) 279 U. S. 438, 73 L. Ed. 789, 49 S. Ct. 411. See *Matter of National Labor Relations Board* (1938) 304 U. S. 486, 82 L. Ed. 1482, 58 S. Ct. 1001.

⁵⁴ *Ex parte Bakelite Corp.* (1929) 279 U. S. 438, 73 L. Ed. 789, 49 S. Ct. 411.

⁵⁵ *Ex parte Bakelite Corp.* (1929) 279 U. S. 438, 73 L. Ed. 789, 49 S. Ct. 411.

⁵⁶ See § 625.

As a general rule an administrative act may be enjoined if the legal and factual issues upon which the right to an injunction rests have not been committed for exclusive initial determination to an administrative agency.⁵⁷ It has been pointed out elsewhere that questions of fact, that is, administrative questions, which are exclusively committed to an administrative agency, are subject to the rigorous primary jurisdiction doctrine.⁵⁸ And it has been pointed out that even judicial questions, that is, questions of law, may be committed to an administrative agency for exclusive initial decision, although a binding decision may only be made upon such questions by an appropriate court acting judicially.⁵⁹ In either of these events, such questions, whether administrative or judicial, must be determined initially by the agency, and until such a determination no resort to judicial proceedings in respect of matters dependent upon those issues may be had.

But where no statute commits to an agency the questions upon which rests the right to an injunction restraining the agency from acting, there is no obstacle to the seeking of judicial relief in a federal district court in accordance with the established principles of equity jurisdiction.⁶⁰ Thus an injunction will lie to enjoin the Secretary of Labor and the Commissioner of Immigration from prosecuting proceedings for deportation, and to enjoin the Secretary of State from refusing to issue a passport on the ground that the complainant is not a citizen where the case rests solely upon the judicial question as

⁵⁷ See § 213 et seq.

⁵⁸ See § 213.

⁵⁹ See § 219.

⁶⁰ *Perkins v. Elg* (1939) 307 U. S. 325, 83 L. Ed. 1320, 59 S. Ct. 884; *Campbell v. Galeno Chemical Co.* (1930) 281 U. S. 599, 74 L. Ed. 1063, 50 S. Ct. 412; *Work v. Louisiana* (1925) 269 U. S. 250, 70 L. Ed. 259, 46 S. Ct. 92.

"The bill does not seek an adjudication that the lands were swamp and overflowed lands or to restrain the Secretary from hearing and determining this question, but merely seeks an adjudication of the right of the State to have this question determined without reference to their mineral character, and to require the Secretary to set aside the order requiring

it to establish their non-mineral character or suffer the rejection of its claim. In short, it is merely a suit to restrain the Secretary from rejecting its claim, independently of the merits otherwise, upon an unauthorized ruling of law illegally requiring it, as a condition precedent, to show that the lands are not mineral in character.

"It is clear that if this order exceeds the authority conferred upon the Secretary by law and is an illegal act done under color of his office, he may be enjoined from carrying it into effect." (Mr. Justice Sanford in *Work v. Louisiana* (1925) 269 U. S. 250, 254, 70 L. Ed. 259, 46 S. Ct. 92.)

to whether or not the complainant is a citizen, and that question, not having been committed for initial administrative decision should be decided in the affirmative.⁶¹ An injunction will lie to restrain the Secretary of the Interior from rejecting a claim, independently of its merits, otherwise, upon an unauthorized ruling of law, illegally requiring the claimant as a condition precedent to administrative determination of the claim, to show that the lands claimed are non-mineral in character.⁶² The fact that the Secretary has not yet exercised his jurisdiction to determine the character of the lands and the fact that the claim is still in the process of administration do not make the suit premature.⁶³ Such a suit is not one to establish title, nor to quiet title.⁶⁴ The bill does not seek adjudication of the administrative question or to restrain the Secretary from hearing and determining it.⁶⁵ And it is clear that if the order embodying the condition precedent exceeds the authority conferred on the Secretary by law, and is an illegal act done under color of his office, he may be enjoined from carrying it into effect.⁶⁶ An injunction will lie to restrain a Prohibition Administrator, the Commissioner of Prohibition, and the Secretary of the Treasury, from revoking permits to manufacture articles containing alcohol, where revocation is attempted by promulgation of regulations going beyond the power granted in the statute.⁶⁷

VI. CERTIORARI

§ 705. In General.

The writ of certiorari cannot be used in the federal courts to review an administrative order.⁶⁸ The procedure and practice of some states

⁶¹ Perkins v. Elg (1939) 307 U. S. 325, 83 L. Ed. 1320, 59 S. Ct. 884.

⁶² Work v. Louisiana (1925) 269 U. S. 250, 70 L. Ed. 259, 46 S. Ct. 92.

⁶³ Work v. Louisiana (1925) 269 U. S. 250, 70 L. Ed. 259, 46 S. Ct. 92.

⁶⁴ Work v. Louisiana (1925) 269 U. S. 250, 70 L. Ed. 259, 46 S. Ct. 92.

⁶⁵ Work v. Louisiana (1925) 269 U. S. 250, 70 L. Ed. 259, 46 S. Ct. 92.

⁶⁶ Work v. Louisiana (1925) 269 U. S. 250, 70 L. Ed. 259, 46 S. Ct. 92.

⁶⁷ Campbell v. Galeno Chemical Co. (1930) 281 U. S. 599, 74 L. Ed. 1063, 50 S. Ct. 412.

⁶⁸ Degge v. Hitchcock (1913) 229 U. S. 162, 57 L. Ed. 1135, 33 S. Ct.

639. See *In re Ban* (D. C. W. D. N. Y., 1927) 21 F. (2d) 1009; *United States ex rel. Donner Steel Co. v. Interstate Commerce Commission* (1925) 56 App. D. C. 44, 8 F. (2d) 905, cert. den. (1926) 270 U. S. 651, 70 L. Ed. 781, 46 S. Ct. 351.

See also John Dickinson in "Administrative Justice and the Supremacy of Law," (1927) p. 62, note 79.

But see *Northern Pac. Ry. Co. v. Interstate Commerce Commission* (1927) 57 App. D. C. 318, 23 F. (2d) 221, cert. den. (1928) 275 U. S. 572, 72 L. Ed. 433, 48 S. Ct. 205.

"This case is the first instance, so far as we can find, in which a Federal

authorize such use of the writ, but cases based upon such procedure and practice are not in point in a federal jurisdiction, where no statute has been passed to enlarge the scope of the writ at common law.⁶⁹ While a federal agency, such as the Postmaster General, acts in a quasi-judicial capacity in issuing an order such as a fraud order, such an agency cannot exercise judicial functions. And in making the determination he is not an officer presiding over a tribunal where his finding is final unless reversed. Not being a judgment, it is not subject to certiorari. Not being a judgment, in the sense of a final adjudication, parties are not concluded by his determination, for if there is an arbitrary exercise of statutory power or a ruling in excess of the jurisdiction conferred, they have the right to apply for and obtain appropriate relief in a court of equity.⁷⁰ Further, if the common law writ, with all of its incidents, could be construed to apply to all administrative and quasi-judicial rulings it could, with a greater show of authority, issue to remove a record before decision and so prevent a ruling in any case where it was claimed there was no jurisdiction to act. This would overturn the principle that, as long as such proceedings are *in fieri* the courts will not interfere with their hearing and disposition.⁷¹ Similarly, administrative orders, not being judgments, are not subject to appeal (in the strict sense)⁷² or writ of error.⁷³

court has been asked to issue a writ of certiorari to review a ruling by an executive officer of the United States Government. That at once suggests that the failure to make such application has been due to the conceded want of power to issue the writ to such officers. For, since the adoption of the Constitution, there have been countless rulings by heads of departments that directly affected personal and property rights and where the writ of certiorari, if available, would have furnished an effective method by which to test the validity of quasi-judicial orders under attack. The modern decisions cited to sustain the power of the court to act in the present case are based on state procedure and statutes that authorize the writ to issue not only to inferior tribunals, boards, assessors and administrative officers, but even to the Chief Executive of a State in pro-

ceedings where a quasi-judicial order has been made. But none of these decisions are in point in a Federal jurisdiction where no statute has been passed to enlarge the scope of the writ at common law." (Mr. Justice Lamar in *Degge v. Hitchcock* (1913) 229 U. S. 162, 169, 170, 57 L. Ed. 1135, 33 S. Ct. 639.)

⁶⁹ *Degge v. Hitchcock* (1913) 229 U. S. 162, 57 L. Ed. 1135, 33 S. Ct. 639.

⁷⁰ *Degge v. Hitchcock* (1913) 229 U. S. 162, 57 L. Ed. 1135, 33 S. Ct. 639.

⁷¹ *Degge v. Hitchcock* (1913) 229 U. S. 162, 57 L. Ed. 1135, 33 S. Ct. 639.

⁷² *Degge v. Hitchcock* (1913) 229 U. S. 162, 57 L. Ed. 1135, 33 S. Ct. 639.

⁷³ *Degge v. Hitchcock* (1913) 229 U. S. 162, 57 L. Ed. 1135, 33 S. Ct. 639.

VII. QUO WARRANTO

§ 706. In General.

A quo warranto proceeding lies to remove directors of a corporation created by act of the legislature and appointed by the legislature, who exercise executive powers in violation of constitutional limitations.⁷⁴

Otherwise the use of quo warranto has had no practical value for purposes of judicial review in the federal courts.

VIII. DECLARATORY JUDGMENT

§ 707. In General.

In cases of actual controversy except with respect to federal taxes the courts of the United States have power upon petition, declaration, complaint, or other appropriate pleadings to declare rights and other legal relations of any interested party petitioning for such declaration, whether or not further relief is or could be prayed, and such declaration has the force and effect of a final judgment or decree and is reviewable as such.⁷⁵ The use of a declaratory judgment, as an additional remedy, in administrative law cases, is clear.⁷⁶ As an additional remedy for the decision of judicial questions without inter-

⁷⁴ *Springer v. Philippine Islands* (1928) 277 U. S. 189, 72 L. Ed. 845, 48 S. Ct. 480.

⁷⁵ 28 USCA, "§ 400. (Judicial Code, section 274d.) Declaratory judgments authorized; procedure

"(1) In cases of actual controversy except with respect to Federal taxes the courts of the United States shall have power upon petition, declaration, complaint, or other appropriate pleadings to declare rights and other legal relations of any interested party petitioning for such declaration, whether or not further relief is or could be prayed, and such declaration shall have the force and effect of a final judgment or decree and be reviewable as such.

"(2) Further relief based on a declaratory judgment or decree may be granted whenever necessary or proper. The application shall be by petition to a court having jurisdiction

to grant the relief. If the application be deemed sufficient, the court shall, on reasonable notice, require any adverse party, whose rights have been adjudicated by the declaration, to show cause why further relief should not be granted forthwith.

"(3) When a declaration of right or the granting of further relief based thereon shall involve the determination of issues of fact triable by a jury, such issues may be submitted to a jury in the form of interrogatories, with proper instructions by the court, whether a general verdict be required or not. (Mar. 3, 1911, c. 231, § 274d, as added June 14, 1934, c. 512, 48 Stat. 955; as amended Aug. 30, 1935, c. 829, § 405, 49 Stat. 1027.)"

⁷⁶ *Interstate Commerce Commission.*

Anderson, Clayton & Co. v. Wichita Valley Ry. Co. (D. C. S. D. Tex., Houston Div., 1936) 15 F. Supp. 475.

ference with the administrative province, its use should be governed in accordance with orthodox criteria. Its use for the determination of administrative questions would be improper.^{76a}

IX. JURISDICTION OF SUITS FOR A WRIT OF HABEAS CORPUS

§ 708. In General.

The Supreme Court, and the district courts, have power to issue writs of *habeas corpus*.⁷⁷

Habeas corpus, a proceeding to enforce the civil right of personal liberty, is itself a civil proceeding, even though the petitioner may be detained under criminal process.⁷⁸ If sufficient ground for the detention of the prisoner in custody is shown by the government, he is not to be discharged for defects in the original arrest or commitment. A writ of *habeas corpus* is not like an action to recover damages for an unlawful arrest or commitment.⁷⁹

Where an individual is arrested upon a deportation warrant as the result of administrative proceedings, judicial review of the administrative determination may be secured by petition for a writ of *habeas corpus* in a federal district court.⁸⁰ If officers in the Department of

Secretary of Labor.

Perkins v. Elg (1939) 307 U. S. 325, 83 L. Ed. 1320, 59 S. Ct. 884.

United States Maritime Commission.

New York & Porto Rico S. S. Co. v. United States (D. C. E. D. N. Y., 1940) 32 F. Supp. 538.

Quotations.

"Since June 1934, the Federal courts have been empowered to grant declaratory judgments in 'cases of actual controversy.' While this proceeding has not yet been extensively used to bring Federal administrative action before the Federal courts, its potentialities are indicated by its wide use in other fields. The declaratory judgment is a general remedy not confined to any particular type of controversy and having no special provision for administrative law. Its utility for judicial review is, therefore, largely in the control of the courts." (Final Report of the Attor-

ney General's Committee on Administrative Procedure, p. 81.)

General References.

See Edwin M. Borchard in "Declaratory Judgments in Administrative Law," (1933) 11 New York Univ. L. Q. Rev. 139.

^{76a} See § 505 et seq.

⁷⁷ 28 USCA 451-466.

⁷⁸ Kabadian v. Doak (1933) 62 App. D. C. 114, 65 F. (2d) 202, cert. den. 290 U. S. 661, 78 L. Ed. 572, 54 S. Ct. 76.

⁷⁹ United States ex rel. Bilokumsky v. Tod (1923) 263 U. S. 149, 68 L. Ed. 221, 44 S. Ct. 54.

⁸⁰ United States ex rel. Vajtauer v. Commissioner of Immigration (1927) 273 U. S. 103, 71 L. Ed. 560, 47 S. Ct. 302; Mahler v. Eby (1924) 264 U. S. 32, 68 L. Ed. 549, 44 S. Ct. 283; United States ex rel. Bilokumsky v. Tod (1923) 263 U. S. 149, 68 L. Ed. 221, 44 S. Ct. 54; Strecker v.

Labor make a finding of an essential fact which is unsupported by evidence, the court may intervene by the writ of *habeas corpus*.⁸¹ Upon a collateral review in *habeas corpus* proceedings it is sufficient that there was some evidence from which the conclusion of the administrative tribunal could be deduced and that it committed no error so flagrant as to convince a court of the essential unfairness of the trial.⁸² This is no more than a sketchy restatement of the general rules as to the extent and scope of judicial review.⁸³

§ 709. Res Judicata and Habeas Corpus.

While the strict doctrine of *res judicata* does not apply to *habeas corpus* proceedings,⁸⁴ the court in its discretion may dismiss an alien's second petition because of the refusal of his first, where the ground of the latter was set up in the former, but evidence to support it was then withheld without excuse for use in a second attempt if the first failed. Otherwise, by abuse of the writ, execution of the administrative order could be postponed indefinitely.⁸⁵

The same principle applies to petitions for a writ of *habeas corpus* assailing the legality of detention by military authorities.⁸⁶

X. JURISDICTION OF SUITS FOR A SUM OF MONEY ONLY

§ 710. Actions at Law for Damages.

Judicial review may be obtained, in proper cases, by actions at law for damages against administrative agents for their wrongful acts.⁸⁷

Kessler (C. C. A. 5th, 1938) 95 F. (2d) 976, aff'd (1939) 307 U. S. 22, 83 L. Ed. 1082, 59 S. Ct. 694; Kabadian v. Doak (1933) 62 App. D. C. 114, 65 F. (2d) 202, cert. den. 290 U. S. 661, 78 L. Ed. 572, 54 S. Ct. 76; United States ex rel. Fong Lung Sing v. Day (C. C. A. 2d, 1930) 37 F. (2d) 36; United States ex rel. Bielozzycka v. Commissioner of Immigration (C. C. A. 2d, 1924) 3 F. (2d) 551.

⁸¹ United States ex rel. Bilokumsky v. Tod (1923) 263 U. S. 149, 68 L. Ed. 221, 44 S. Ct. 54.

⁸² United States ex rel. Vajtauer v. Commissioner of Immigration (1927) 273 U. S. 103, 71 L. Ed. 560, 47 S. Ct. 302.

⁸³ See § 249 et seq.

⁸⁴ Wong Doo v. United States (1924) 265 U. S. 239, 68 L. Ed. 999, 44 S. Ct. 524.

⁸⁵ Wong Doo v. United States (1924) 265 U. S. 239, 68 L. Ed. 999, 44 S. Ct. 524.

⁸⁶ United States ex rel. Bergdoll v. Drum (C. C. A. 2d, 1939) 107 F. (2d) 897, 129 A. L. R. 1165, cert. den. (1940) 310 U. S. 648, 84 L. Ed. 1414, 60 S. Ct. 1098.

⁸⁷ Lane v. Wilson (1939) 307 U. S. 268, 83 L. Ed. 1281, 59 S. Ct. 872; Grovey v. Townsend (1935) 295 U. S. 45, 79 L. Ed. 1292, 55 S. Ct. 622, 97 A. L. R. 680; Nixon v. Condon (1932) 286 U. S. 73, 76 L. Ed. 984, 52 S. Ct. 484, 88 A. L. R. 458. See also § 826 et seq.

§ 711. Suits for Restitution.

Suit may be brought for the restitution of money paid under a rate order later set aside,⁸⁸ or under a tariff duly filed with the Interstate Commerce Commission, but alleged to be invalid.⁸⁹ A cause of action for restitution is a type of the broader cause of action for money had and received, a remedy which is equitable in origin and function.⁹⁰ The claimant, to prevail, must show that the money was received in such circumstances that the possessor will give offense to equity and good conscience if permitted to retain it.⁹¹ The question is no longer whether the law would put him in possession of the money if the transaction were a new one. The question is whether the law will take it out of his possession after he has been able to collect it.⁹² If part of the money may, in equity and good conscience, be retained, the court will allow recovery only of that part which cannot be so retained.⁹³ Restitution is not of mere right. It is *ex gratia*, resting in the exercise of a sound discretion.⁹⁴ The equities of the case determine even though the claim for restitution is made in an action triable in a court of law,⁹⁵ and the court will not order it where the justice of the case does not call for it, nor where the process is set aside for a mere slip.⁹⁶ For instance there will be no restitution of money paid under color of an order of the Interstate Commerce Com-

⁸⁸ *Baldwin v. Scott County Milling Co.* (1939) 307 U. S. 478, 83 L. Ed. 1409, 59 S. Ct. 943.

⁸⁹ *Turner, D. & L. Lumber Co. v. Chicago, M. & St. P. R. Co.* (1926) 271 U. S. 259, 70 L. Ed. 934, 46 S. Ct. 530.

⁹⁰ *Atlantic Coast Line R. Co. v. Florida* (1935) 295 U. S. 301, 79 L. Ed. 1451, 55 S. Ct. 713, rehearing denied 295 U. S. 769, 79 L. Ed. 1710, 55 S. Ct. 911.

See note "The Morgan Cases: Retroactive Validation of Procedurally Defective Administrative Action," (1939) 53 Harv. L. Rev. 105.

⁹¹ *Atlantic Coast Line R. Co. v. Florida* (1935) 295 U. S. 301, 79 L. Ed. 1451, 55 S. Ct. 713, rehearing denied 295 U. S. 769, 79 L. Ed. 1710, 55 S. Ct. 911.

⁹² *Atlantic Coast Line R. Co. v. Florida* (1935) 295 U. S. 301, 79 L.

Ed. 1451, 55 S. Ct. 713, rehearing denied 295 U. S. 769, 79 L. Ed. 1710, 55 S. Ct. 911.

⁹³ *Atlantic Coast Line R. Co. v. Florida* (1935) 295 U. S. 301, 79 L. Ed. 1451, 55 S. Ct. 713, rehearing denied 295 U. S. 769, 79 L. Ed. 1710, 55 S. Ct. 911.

⁹⁴ *Atlantic Coast Line R. Co. v. Florida* (1935) 295 U. S. 301, 79 L. Ed. 1451, 55 S. Ct. 713, rehearing denied 295 U. S. 769, 79 L. Ed. 1710, 55 S. Ct. 911.

⁹⁵ *Atlantic Coast Line R. Co. v. Florida* (1935) 295 U. S. 301, 79 L. Ed. 1451, 55 S. Ct. 713, rehearing denied 295 U. S. 769, 79 L. Ed. 1710, 55 S. Ct. 911.

⁹⁶ *Atlantic Coast Line R. Co. v. Florida* (1935) 295 U. S. 301, 79 L. Ed. 1451, 55 S. Ct. 713, rehearing denied 295 U. S. 769, 79 L. Ed. 1710, 55 S. Ct. 911.

mission, which has been held void for lack of basic findings, where a later order in the same terms is held valid, the imperfection of form having been corrected.⁹⁷ In such case it is not enough for the claimant to show that the rates under which he claims are reasonable; he must show that the rates under which collection was made are unreasonable.⁹⁸

§ 712. — As Ancillary to Judicial Review Suits.

The right to recover what has been lost by enforcement of a judgment subsequently reversed is well established. While the subject of the controversy and the parties are before the court, it has jurisdiction to enforce restitution and, so far as possible, to correct what has been wrongfully done.⁹⁹ Thus, where a decree dismissing a suit to set aside an administrative order has been reversed on appeal, under compulsion of which a party has suffered loss, and the party applies for restitution and reference to a master it is the duty of the court to retain jurisdiction, enter a decree that appellants are entitled to restitution, and refer the case to a master as prayed in appellants' motion.¹ Otherwise, if each claim of the very large number involved is treated as a separate cause of action enforceable only at law, the number of suits and the burden of maintaining them would be so enormous that relegation to that remedy would be a virtual denial of justice.²

§ 713. Miscellaneous Actions.

Another occasional form of review is where suit is brought upon a contract, the terms of which are affected by an agency's determination.³ Thus, although the federal district courts have, under Judicial Code, section 208,^{3a} exclusive jurisdiction of suits to enjoin, set aside, annul, or suspend orders of the Interstate Commerce Com-

⁹⁷ Atlantic Coast Line R. Co. v. Florida (1935) 295 U. S. 301, 79 L. Ed. 1451, 55 S. Ct. 713, rehearing denied 295 U. S. 769, 79 L. Ed. 1710, 55 S. Ct. 911.

⁹⁸ Atlantic Coast Line R. Co. v. Florida (1935) 295 U. S. 301, 79 L. Ed. 1451, 55 S. Ct. 713, rehearing denied 295 U. S. 769, 79 L. Ed. 1710, 55 S. Ct. 911.

⁹⁹ Baltimore & O. R. Co. v. United States (1929) 279 U. S. 781, 73 L. Ed. 954, 49 S. Ct. 492.

¹ Baltimore & O. R. Co. v. United States (1929) 279 U. S. 781, 73 L. Ed. 954, 49 S. Ct. 492.

² Baltimore & O. R. Co. v. United States (1929) 279 U. S. 781, 73 L. Ed. 954, 49 S. Ct. 492.

³ Patterson v. Stanolind Oil & Gas Co. (1939) 305 U. S. 376, 83 L. Ed. 231, 59 S. Ct. 259; Central New England R. Co. v. Boston & A. R. Co. (1929) 279 U. S. 415, 73 L. Ed. 770, 49 S. Ct. 358.

^{3a} 28 USCA 46.

mission,⁴ actions not within that section may be brought in the ordinary courts. Section 22 of the Interstate Commerce Act expressly preserves existing common law and statutory remedies. Thus a state court in a contract action properly brought has power to construe an Interstate Commerce Commission order relevant to the controversy.⁵ Suit may be brought for moneys segregated by a court pending its final decision.⁶ Suit may also be brought for recovery of a fine paid.⁷

§ 714. Jurisdiction of the Court of Claims.

By statute the Court of Claims has jurisdiction over suits for a sum of money which are in the nature of judicial review.⁸ But Congress may refer a claim against the United States to an administrative agency, for final determination.⁹

Orders of the Interstate Commerce Commission under the Railway Mail Pay Act¹⁰ may be reviewed in the Court of Claims under the Tucker Act.¹¹ Where an agency makes an appropriate finding of reasonable compensation under the Railway Mail Pay Act but fails, because of an alleged error of law, to order payment of the full amount which the railroad believes is payable under the finding, the Court of Claims has jurisdiction of an action for the balance, as the claim is founded on a law of Congress.¹²

XI. SCOPE OF FEDERAL JURISDICTION RESPECTING QUESTIONS OF STATE LAW

§ 715. Federal Question Required.

Federal district courts have jurisdiction over controversies involving state administrative agencies only upon compliance with the orthodox requirements for invoking federal jurisdiction.¹³

⁴ See § 633 et seq.

⁵ *Central New England R. Co. v. Boston & A. R. Co.* (1929) 279 U. S. 415, 73 L. Ed. 770, 49 S. Ct. 358.

⁶ See § 740 et seq.

⁷ *Compagnie Generale Transatlantique v. Elting* (1936) 298 U. S. 217, 80 L. Ed. 1151, 56 S. Ct. 770.

⁸ *Williamsport Wire Rope Co. v. United States* (1928) 277 U. S. 551, 72 L. Ed. 985, 48 S. Ct. 587.

⁹ See *Williamsport Wire Rope Co. v. United States* (1928) 277 U. S.

551, 72 L. Ed. 985, 48 S. Ct. 587. See also § 426.

¹⁰ Act of July 28, 1916, c. 261, § 5, 39 Stat. 412, 425, 429, 430, 39 USCA 524, 541.

¹¹ 24 Stat. 535. *United States v. Griffin* (1938) 303 U. S. 226, 82 L. Ed. 764, 58 S. Ct. 601; *United States v. New York Cent. R. Co.* (1929) 279 U. S. 73, 73 L. Ed. 619, 49 S. Ct. 260.

¹² *United States v. Griffin* (1938) 303 U. S. 226, 82 L. Ed. 764, 58 S. Ct. 601.

¹³ See § 614 et seq.

Decisions of state courts may only be reviewed by the United States Supreme Court where it appears affirmatively from the record, not only that a federal question was presented for decision to the highest court of the state having jurisdiction but that its decision of the federal question was necessary to the determination of the cause.¹⁴

§ 716. Federal Jurisdiction Extends to Determination of Local Questions Involved.

Where a District Court obtains jurisdiction of a case involving an order of a state administrative agency because a federal question is involved, the District Court obtains jurisdiction to determine all questions in the case, local as well as federal.¹⁵ The Supreme Court is always reluctant to pass upon a seriously controverted question of the meaning of a state statute, because its decision, although disposing of the particular case, cannot settle the issue of the proper construction of the statute.¹⁶ But when not instructed by some decision of a state court, the Supreme Court, in exercising appellate jurisdiction, is disposed to accept the construction given by the lower federal court to a statute of the state, particularly when that court is composed wholly of citizens of the state, familiar with the history of the statute, the local conditions to which it applies, and the character of the state's laws.¹⁷ This rule should be borne in mind when asking that a three-judge court should be assembled under section 266 of the Judicial Code.¹⁸ If a question of construction of a state statute is involved, the securing of three judges from the state in question tends toward the securing of a final disposition of the case in one suit.

Despite the described reluctance of the Supreme Court to construe state statutes, it will do so in a state rate case where the state commission could have secured construction by the state court by bringing

14 "We have repeatedly held that it is essential to the jurisdiction of this Court in reviewing a decision of a court of a State that it must appear affirmatively from the record, not only that a federal question was presented for decision to the highest court of the State having jurisdiction but that its decision of the federal question was necessary to the determination of the cause; that the federal question was actually decided or that the judgment as rendered could not have been given without deciding

it." (Per curiam, *Southwestern Bell Telephone Co. v. Oklahoma* (1938) 303 U. S. 206, 212, 213, 82 L. Ed. 751, 58 S. Ct. 528.)

15 *Railroad Commission v. Pacific Gas & Electric Co.* (1938) 302 U. S. 388, 82 L. Ed. 319, 58 S. Ct. 334.

16 *Thompson v. Consolidated Gas Utilities Corp.* (1937) 300 U. S. 55, 81 L. Ed. 510, 57 S. Ct. 364.

17 *Thompson v. Consolidated Gas Utilities Corp.* (1937) 300 U. S. 55, 81 L. Ed. 510, 57 S. Ct. 364.

18 28 USCA 380. See also § 672.

a new action to enforce the order in question, in the state court, under section 266 of the Judicial Code¹⁹ and staying in that action the proceedings in the federal court, but failed to do so.²⁰ The construction of a state statute by the state courts is binding on the Supreme Court of the United States.²¹

¹⁹ 28 USCA 380.

²¹ See §§ 9, 232.

²⁰ *Thompson v. Consolidated Gas Utilities Corp.* (1937) 300 U. S. 55, 81 L. Ed. 510, 57 S. Ct. 364.

CHAPTER 38

VENUE

§ 717. In General.

The venue of suits for judicial review of administrative action, as in other suits, is the creature of statute. The venue of a suit brought under the Urgent Deficiencies Act "shall be in the judicial district wherein is the residence of the party or any of the parties upon whose petition the order was made," with certain exceptions.¹ When a railroad tariff has been ordered to be canceled pursuant to a protest contained in a petition or complaint filed with the Interstate Commerce Commission, its resultant order is made upon the petition of the protesting party, and the venue of a suit attacking such order must be laid in the district in which such protesting party resides.² A party with the right to intervene as a plaintiff in a suit brought under the Urgent Deficiencies Act may do so even though he could not have originally brought the suit where the venue is laid.³ When an administrative order is attacked under the Urgent Deficiencies Act by different parties affected in different venues at the same time, it is within the discretion of the court in the second suit to permit it to continue or to stay all proceedings therein pending disposition of the earlier suit.⁴ Thus, where the question of pendency of an earlier suit in a different venue was not raised until final hearing there was no abuse of discretion in permitting the later suit to continue.⁵

The same statutory provision determines the venue of suits to review orders of the Secretary of Agriculture entered under the Perishable Agricultural Commodities Act;⁶ but where a suit is brought to restrain action by an agency under an order or in enforcement of it, under the

¹ 28 USCA 43. *Isbrandtsen-Moller Co. v. United States* (1937) 300 U. S. 139, 81 L. Ed. 562, 57 S. Ct. 407.

² *Hudson & Manhattan R. Co. v. United States* (D. C. S. D. N. Y., 1939) 28 F. Supp. 137.

³ *Kansas City Southern R. Co. v. United States* (1931) 282 U. S. 760, 75 L. Ed. 684, 51 S. Ct. 304.

⁴ *Kansas City Southern R. Co. v. United States* (1931) 282 U. S. 760, 75 L. Ed. 684, 51 S. Ct. 304.

⁵ *Kansas City Southern R. Co. v. United States* (1931) 282 U. S. 760, 75 L. Ed. 684, 51 S. Ct. 304.

⁶ *Abe Rafelson Co., Inc. v. Tugwell* (C. C. A. 7th, 1935) 79 F. (2d) 653.

general equity powers of the federal district court, venue is determined by orthodox requirements under the general statutes.⁷ If the venue has been laid in the wrong district, the suit will be dismissed.⁸

In a suit against a state administrative tribunal venue may be laid in the district of the residence of a member thereof.⁹

⁷ *Abe Rafelson Co., Inc. v. Tugwell* (C. C. A. 7th, 1935) 79 F. (2d) 653.

⁹ *Northern Indiana Public Service Co. v. Public Service Commission* (D. C. N. D. Ind., 1932) 1 F. Supp. 296.

⁸ *Hudson & Manhattan R. Co. v. United States* (D. C. S. D. N. Y., 1939) 28 F. Supp. 137.

CHAPTER 39

PARTIES

- § 718. Parties Plaintiff.
- § 719. Parties Defendant.
- § 720. —In Suits Under the Urgent Deficiencies Act.
- § 721. Substitution of Parties and Survival of Actions.
- § 722. —Abatement.
- § 723. Intervention.
- § 724. Process Matters.
- § 725. Parties Bound by Decree.

§ 718. Parties Plaintiff.

A stockholder in a corporation may sue to enjoin the corporation and an administrative agency from enforcing rates prescribed by the agency.¹ The Interstate Commerce Commission has the legal capacity to sue as a party plaintiff.² And statutes commonly provide for the institution of suits by administrative agencies which also conduct adversary proceedings.³ The National Labor Relations Board is a body corporate with legal capacity to be a party plaintiff or defendant in federal courts.⁴

§ 719. Parties Defendant.

It is the universal practice, sustained by authority, that the only mode of judicial relief against unreasonable rates is by suit against the governmental authority which established them or is charged with the duty of enforcing them.⁵ If a statute provides for enforcement by criminal prosecution, the United States attorney is the proper party defendant in a suit to restrain a criminal prosecution.⁶

A suit to restrain an officer of the United States from acting illegally is not a suit against the United States, and the United States

¹ Rowland v. Boyle (1917) 244 U. S. 577.

² Texas & P. R. Co. v. Interstate

Commerce Commission (1896) 162 U. S. 197, 40 L. Ed. 940, 16 S. Ct. 666.

³ See § 825.

⁴ Jamestown Veneer & Plywood Corp. v. National Labor Relations Board (D. C. W. D. N. Y., 1936) 13

F. Supp. 405.

⁵ City of New York v. New York Telephone Co. (1923) 261 U. S. 312, 67 L. Ed. 673, 43 S. Ct. 372; In re Englehard & Sons Co. (1914) 231 U. S. 646, 58 L. Ed. 416, 34 S. Ct. 258.

⁶ Shields v. Utah Idaho C. R. Co. (1938) 305 U. S. 177, 83 L. Ed. 111, 59 S. Ct. 60.

is not a necessary party to such a suit.⁷ Thus a suit to restrain the Secretary of the Interior from requiring an illegal condition precedent to the adjudication of a land claim is not a suit against the United States, even though it still retains title to the lands; and the United States is not an indispensable party.⁸ Neither are homestead entrymen indispensable parties to such a suit.⁹ But the United States is a necessary party defendant in a suit to set aside a license issued by the Federal Power Commission,¹⁰ and in suits under the Urgent Deficiencies Act.¹¹

Where the order was made by an administrative tribunal it may be sued either as an entity, such as "Interstate Commerce Commission,"¹² "Public Utilities Commission," "Public Service Commission," etc.,¹³ or the members thereof may be separately named as the persons composing the agency, and thus be sued in their official capacities, not as individuals.¹⁴ If the agency may be sued as an entity, difficulties inherent in the substitution of successor members may be avoided.^{14a}

If enforcement of an administrative order is committed to a state attorney general, he should be joined as a party defendant,¹⁵ but where the statute stipulates who shall be members of the board without including the attorney-general, providing that he cannot be a member, he should not be included as a party defendant in a suit to enjoin enforcement of one of the agency's regulations.¹⁶ In a suit

⁷ *Ickes v. Fox* (1937) 300 U. S. 82, 81 L. Ed. 525, 57 S. Ct. 412, rehearing denied 300 U. S. 686, 81 L. Ed. 888, 57 S. Ct. 504; *Work v. Louisiana* (1925) 269 U. S. 250, 70 L. Ed. 259, 46 S. Ct. 92.

⁸ *Work v. Louisiana* (1925) 269 U. S. 250, 70 L. Ed. 259, 46 S. Ct. 92.

⁹ *Work v. Louisiana* (1925) 269 U. S. 250, 70 L. Ed. 259, 46 S. Ct. 92.

¹⁰ *Harris v. Central Nebraska Public Power & Irrigation Dist.* (D. C. D. Neb., 1938) 29 F. Supp. 425.

¹¹ See § 720.

¹² See the table of cases for suits brought against various Commissions as entities.

¹³ See the table of cases for suits involving Railroad Commissions, Corporation Commissions, Public Service Commissions, various Boards, etc.

¹⁴ **Federal Power Commission.**

Appalachian Electric Power Co. v. Smith (C. C. A. 4th, 1933) 67 F. (2d)

451, cert. den. (1934) 291 U. S. 674, 78 L. Ed. 1063, 54 S. Ct. 458.

State Agencies.

Northern Indiana Public Service Co. v. Public Service Commission (D. C., N. D. Ind., South Bend Div., 1932) 1 F. Supp. 296. See *McCart v. Indianapolis Water Co.* (1938) 302 U. S. 419, 82 L. Ed. 336, 58 S. Ct. 324; *Henderson Co. v. Thompson* (1937) 300 U. S. 258, 81 L. Ed. 632, 57 S. Ct. 447; *Thompson v. Consolidated Gas Utilities Corp.* (1937) 300 U. S. 55, 81 L. Ed. 510, 57 S. Ct. 364; *McCardle v. Indianapolis Water Co.* (1926) 272 U. S. 400, 71 L. Ed. 316, 47 S. Ct. 144.

^{14a} See §§ 721, 722.

¹⁵ See, for instance, *Kroger Grocery & Baking Co. v. Lutz* (1936) 299 U. S. 300, 81 L. Ed. 251, 57 S. Ct. 215.

¹⁶ *Sweeney v. Pennsylvania Department of Public Assistance Board* (D. C. M. D. Pa., 1940) 33 F. Supp. 587.

to enjoin a reparation order made by a state commission, the parties in whose favor the award of reparation was made are necessary parties in interest.¹⁷

Where the statute vests authority to make regulations in the head of an agency, he is an indispensable party defendant to a suit to enjoin enforcement of such regulations, and cannot be reached by a suit against his subalterns.¹⁸

In a suit to set aside a rate order made by a state agency, a city interested in the rates is not a necessary party defendant.^{18a}

Necessary parties defendant in a suit for a mandamus order are treated elsewhere.¹⁹

§ 720. — In Suits Under the Urgent Deficiencies Act.

In suits brought under the Urgent Deficiencies Act ²⁰ the United States is the only necessary party defendant,²¹ although it may not be a necessary party on appeal in an appropriate case.²² Others interested may become parties by intervention,²³ but, if joined involuntarily may, upon application, be stricken out as parties even though they include the very agency promulgating the order.²⁴

§ 721. Substitution of Parties and Survival of Actions.

Substitution of parties is provided for in the Federal Rules of Civil Procedure.²⁵

Where a defendant state officer leaves office, his successor, who has not adopted his attitude, and is not proceeding nor threatening to

¹⁷ *Louisville & N. R. Co. v. Garrett* (1913) 231 U. S. 298, 58 L. Ed. 229, 34 S. Ct. 48.

¹⁸ *Redlands Foothill Groves v. Jacobs* (D. C. S. D. Cal., Cent. Div., 1940) 30 F. Supp. 995.

^{18a} *City of New York v. New York Telephone Co.* (1923) 261 U. S. 312, 67 L. Ed. 673, 43 S. Ct. 372.

¹⁹ See § 701.

²⁰ 28 USCA 43 et seq.

²¹ *Isbrandtsen-Moller Co., Inc. v. United States* (1937) 300 U. S. 139, 81 L. Ed. 562, 57 S. Ct. 407; *Interstate Commerce Commission v. Oregon-Washington R. & N. Co.* (1933) 288 U. S. 14, 77 L. Ed. 588, 53 S. Ct. 266; *Lambert Run Coal Co. v. Baltimore & O. R. Co.* (1922) 258 U. S. 377, 66 L. Ed. 671, 42 S. Ct.

349. See *United States v. Baltimore & O. R. Co.* (1935) 293 U. S. 454, 79 L. Ed. 587, 55 S. Ct. 268.

²² *The Chicago Junction Case* (1924) 264 U. S. 258, 68 L. Ed. 667, 44 S. Ct. 317.

²³ *United States v. Idaho* (1936) 298 U. S. 105, 80 L. Ed. 1070, 56 S. Ct. 690.

²⁴ *Isbrandtsen-Moller Co., Inc. v. United States* (1937) 300 U. S. 139, 81 L. Ed. 562, 57 S. Ct. 407.

²⁵ Rule 25 (d) of the Federal Rules of Civil Procedure:

“Rule 25. Substitution of Parties.

“(d) Public Officers; Death or Separation from Office. When an officer of the United States, the District of Columbia, a state, county, city, or other governmental agency,

proceed to enforce the statute, cannot be substituted as defendant, where state law does not authorize such substitution.²⁶ Liability in such suits is personal, and there is no privity between the two officers.²⁷ The latter is charged with the same statutory duties as the former. The powers and duties of such an office are impersonal and unaffected by a change in the person holding it.²⁸ The mere declaration of a statute that the officer shall sue to enforce it is not sufficient. The successor may regard the statute as unconstitutional and rightly refrain from attempting to enforce it.²⁹

When the incumbent of the office of Commissioner³⁰ changes, no substitution of the name of his successor is required in proceedings before any appellate court reviewing the action of the Board of Tax Appeals.³¹

§ 722. — Abatement.

The cause in which judicial review is being had does not abate so long as the agency's order remains in effect and the agency remains capable of enforcing it.³² For instance, there is no abatement where a District Director of Immigration, defendant in a *habeas corpus* proceeding, is no longer Director in the District where he formerly

or any other officer specified in the Act of February 13, 1925, c. 229, § 11 (43 Stat. 941), U. S. C., Title 28, § 780, is a party to an action and during its pendency dies, resigns, or otherwise ceases to hold office, the action may be continued and maintained by or against his successor, if within 6 months after the successor takes office it is satisfactorily shown to the court that there is a substantial need for so continuing and maintaining it. Substitution pursuant to this rule may be made when it is shown by supplemental pleading that the successor of an officer adopts or continues or threatens to adopt or continue the action of his predecessor in enforcing a law averred to be in violation of the Constitution of the United States. Before a substitution is made, the party or officer

to be affected, unless expressly assenting thereto, shall be given reasonable notice of the application therefor and accorded an opportunity to object."

See § 722.

²⁶ Ex parte La Prade (1933) 289 U. S. 444, 77 L. Ed. 1311, 53 S. Ct. 682.

²⁷ Ex parte La Prade (1933) 289 U. S. 444, 77 L. Ed. 1311, 53 S. Ct. 682.

²⁸ Wilbur v. United States ex rel. Kadrie (1930) 281 U. S. 206, 74 L. Ed. 809, 50 S. Ct. 320.

²⁹ Ex parte La Prade (1933) 289 U. S. 444, 77 L. Ed. 1311, 53 S. Ct. 682.

³⁰ See Commissioner of Internal Revenue.

³¹ 26 USCA 1143.

³² United States ex rel. Volpe v. Smith (1933) 289 U. S. 422, 77 L. Ed. 1298, 53 S. Ct. 665.

held the petitioner in custody but has continued to be an officer of the Department of Labor and under existing regulations may carry out the deportation order, the cause was permitted to proceed without question after the Director left the District and the petitioner insists no reason for abatement is shown.³³

Where an agency is a continuous body, the retirement or death of members does not effect the abatement of a suit against the agency, and successors can be substituted as parties.³⁴ A suit to enjoin a state officer, brought against him individually, charging that he is threatening to enforce an unconstitutional statute, *colori officii*, is personal in nature and abates when he ceases to hold office, in the absence of statutory provisions to the contrary.³⁵ The inherent difficulty is not in the liability or suability of a successor, in a new suit. It is in the shifting from the personal liability of the first officer for threatened wrong or abuse of his office to the personal liability of his successor when there is no privity between them, as there is not when the officer sued is injuring or threatening to injure the complainant without lawful official authority,³⁶ and the successor has not adopted the attitude of his predecessor.³⁷ At the suggestion of the Supreme Court Congress enacted a statute under which successors of United States officers going out of office during litigation may be substituted for them.³⁸ The statute supposes a suit already begun against the

³³ United States ex rel. Volpe v. Smith (1933) 289 U. S. 422, 77 L. Ed. 1298, 53 S. Ct. 665.

³⁴ Gorham Mfg. Co. v. Wendell (1923) 261 U. S. 1, 67 L. Ed. 505, 43 S. Ct. 313.

³⁵ Ex parte La Prade (1933) 289 U. S. 444, 77 L. Ed. 1311, 53 S. Ct. 682; Gorham Mfg. Co. v. Wendell (1923) 261 U. S. 1, 67 L. Ed. 505, 43 S. Ct. 313.

³⁶ Gorham Mfg. Co. v. Wendell (1923) 261 U. S. 1, 67 L. Ed. 505, 43 S. Ct. 313.

³⁷ Ex parte La Prade (1933) 289 U. S. 444, 77 L. Ed. 1311, 53 S. Ct. 682.

³⁸ Gorham Mfg. Co. v. Wendell (1923) 261 U. S. 1, 67 L. Ed. 505, 43

S. Ct. 313.

28 USCA, "§ 780. Survival of actions, suits or proceedings—

"(a) *By or against officer of United States, District of Columbia, Canal Zone, or territory or insular possession of United States, or of county, and so forth, of such territory or insular possession.* Where, during the pendency of an action, suit, or other proceeding brought by or against an officer of the United States, or of the District of Columbia, or the Canal Zone, or of a Territory or an insular possession of the United States, or of a county, city, or other governmental agency of such Territory or insular possession, and relating to the present or future discharge

predecessor during his lifetime. The liability is still personal, as it was before the statute. There is no new statutory liability attached to the office and passing to successors.³⁹ And this statute is not an enabling act in the case of state officers.⁴⁰ Federal courts can, however, avail themselves of any state provision for substitution of successors of state officers in suits to enjoin action *colori officii* alleged to be unauthorized or unconstitutional. Practically the question in such cases is not personal at all, and it is important to the state that it be disposed of promptly. Hence, when state officers consent, federal courts need not be astute to enforce the abatement of the suit if any basis at all can be found in state law or the practice of state courts for the substitution of successors in office.⁴¹ Such a basis, sufficient for the Supreme Court to grant substitution, is an inference, drawn from a *dictum* in a state case, and from the fact that such substitutions have in fact been made in cases appealed to the Supreme Court, although the law passed there without notice.⁴²

of his official duties, such officer dies, resigns, or otherwise ceases to hold such office, it shall be competent for the court wherein the action, suit, or proceeding is pending, whether the court be one of first instance or an appellate tribunal, to permit the cause to be continued and maintained by or against the successor in office of such officer, if within six months after his death or separation from the office it be satisfactorily shown to the court that there is a substantial need for so continuing and maintaining the cause and obtaining an adjudication of the questions involved.

“(b) *By or against officer of State, county, city, and so forth.* Similar proceedings may be had and taken where an action, suit, or proceeding brought by or against an officer of a State, or of a county, city, or other governmental agency of a State, is pending in a court of the United States at the time of the offi-

cer's death or separation from the office.

“(c) *Notice of application for substitution of parties.* Before a substitution under this section is made, the party or officer to be affected, unless expressly consenting thereto, must be given reasonable notice of the application therefor and accorded an opportunity to present any objection which he may have. (Feb. 8, 1899, c. 121, 30 Stat. 822; Feb. 13, 1925, c. 229, § 11, 43 Stat. 941.)”

³⁹ *Smietanka v. Indiana Steel Co.* (1921) 257 U. S. 1, 66 L. Ed. 99, 42 S. Ct. 1.

⁴⁰ *Gorham Mfg. Co. v. Wendell* (1923) 261 U. S. 1, 67 L. Ed. 505, 43 S. Ct. 313.

⁴¹ *Gorham Mfg. Co. v. Wendell* (1923) 261 U. S. 1, 67 L. Ed. 505, 43 S. Ct. 313.

⁴² *Gorham Mfg. Co. v. Wendell* (1923) 261 U. S. 1, 67 L. Ed. 505, 43 S. Ct. 313.

§ 723. Intervention.

Conditions for intervention are set forth in Rule 24 of the Federal Rules of Civil Procedure,⁴³ and certain statutes.⁴⁴

It is the universal practice, sustained by authority, that the only mode of judicial relief against unreasonable rates is by suit against the governmental authority which established them or is charged with the duty of enforcing them.⁴⁵ Hence, in a suit to enjoin the enforcement of telephone rate orders of a state commission, the commission is the necessary defendant. Where the commission's counsel and the attorney-general of the state are already parties defendant, a city, whose only interest is as a subscriber with no control over the rates, and no direct interest in them, since its rates are fixed by special contract, is not a necessary party. It is completely in the discretion of

⁴³ Rule 24 of the Federal Rules of Civil Procedure:

"Rule 24. Intervention

"(a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) When a statute of the United States confers an unconditional right to intervene; or (2) when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action; or (3) when the applicant is so situated as to be adversely affected by a distribution or other disposition of property in the custody of the court or of an officer thereof.

"(b) Permissive Intervention. Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

"(c) Procedure. A person desiring to intervene shall serve a motion to intervene upon all parties affected thereby. The motion shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought. The same procedure shall be followed when a statute of the United States gives a right to intervene. When the constitutionality of an act of Congress affecting the public interest is drawn in question in any action to which the United States or an officer, agency, or employee thereof is not a party, the court shall notify the Attorney General of the United States as provided in the Act of August 24, 1937, c. 754, § 1."

⁴⁴ Interstate Commerce Commission.

28 USCA 45a.

Secretary of Agriculture.

7 USCA 1115 (d).

⁴⁵ City of New York v. New York Telephone Co. (1923) 261 U. S. 312, 67 L. Ed. 673, 43 S. Ct. 372; In re Engelhard & Sons Co. (1914) 231 U. S. 646, 58 L. Ed. 416, 34 S. Ct. 258.

the federal district court to refuse its application to intervene as a party defendant.⁴⁶ The commission adequately represents the subscribers in the city.⁴⁷ Similarly, where a utility sues a city to enjoin the enforcement of rates prescribed by the city, the city represents all interested parties. It is not competent for each individual having dealings with the regulated company to raise a contest in the courts over the questions which ought to be settled in this general and conclusive way.⁴⁸

Parties directly affected by a challenged administrative order and in a position not substantially different from that of plaintiff or defendant may be granted permission to intervene.⁴⁹ In a suit by a utility to enjoin the enforcement of an administrative order prescribing rates for electricity supplied to it by a second utility, the second utility was held to be a proper though not indispensable party.⁵⁰

In a suit brought against a United States attorney to restrain a criminal prosecution, an agency which made the findings upon the basis of which a second agency made the administrative order in question, may intervene.⁵¹

All proper parties in interest, including states, may intervene in suits brought under the Urgent Deficiencies Act.⁵²

§ 724. Process Matters.

A complaint in a suit for judicial review ordinarily should be served so as to comply with the ordinary rules for acquiring jurisdiction over the defendants. These of course vary with the circumstances relating to particular agencies. The Federal Rules of Civil Procedure contain general provisions for service of process upon officers or agencies of the United States.⁵³

⁴⁶ *City of New York v. New York Telephone Co.* (1923) 261 U. S. 312, 67 L. Ed. 673, 43 S. Ct. 372.

⁴⁷ *City of New York v. New York Telephone Co.* (1923) 261 U. S. 312, 67 L. Ed. 673, 43 S. Ct. 372.

⁴⁸ *In re Engelhard & Sons Co.* (1914) 231 U. S. 646, 58 L. Ed. 416, 34 S. Ct. 258.

⁴⁹ *Western Union Telegraph Co. v. Industrial Commission* (D. C. D. Minn., 4th Div., 1938) 24 F. Supp. 370.

⁵⁰ *Wichita Railroad & Light Co. v. Public Utilities Commission* (1922)

260 U. S. 48, 67 L. Ed. 124, 43 S. Ct. 51.

⁵¹ *Shields v. Utah Idaho C. R. Co.* (1938) 305 U. S. 177, 83 L. Ed. 111, 59 S. Ct. 160.

⁵² 28 USCA 45a. *Texas v. Interstate Commerce Commission* (1922) 258 U. S. 158, 66 L. Ed. 531, 42 S. Ct. 261.

⁵³ Rule 4 (d) (5) of the Federal Rules of Civil Procedure:

"Rule 4. Process

"(d) Summons: Personal Service.

The summons and complaint shall be served together. The plaintiff shall

To the extent that the National Labor Relations Board is a legal entity, distinct from its members as individuals, which may sue and be sued in respect of its appointed activities, it is located in the District of Columbia, and cannot be called on as such to answer in the courts elsewhere, except as specially provided by law.⁵⁴ Service upon the regional director of the National Labor Relations Board or upon an attorney for the Board within any federal district except the District of Columbia is not sufficient to obtain jurisdiction over the Board.⁵⁵ The Federal Power Commission and the individual members thereof in their official capacities may be sued only in the District of Columbia.⁵⁶

Under the Urgent Deficiencies Act the complaint (originally denominated "petition"^{56a}), shall be forthwith served by filing a copy thereof in the office of the Secretary of the Interstate Commerce Commission and in the Department of Justice.⁵⁷ Orders, writs and processes may run, be served, and be returnable anywhere in the United States.⁵⁸

§ 725. Parties Bound by Decree.

The customers of a utility are bound by a decree enjoining enforcement of rates prescribed by an administrative agency, since in such a suit the agency represents the public, including the utility's customers.⁵⁹

furnish the person making service with such copies as are necessary. Service shall be made as follows:
* * *

"(5) Upon an officer or agency of the United States, by serving the United States and by delivering a copy of the summons and of the complaint to such officer or agency. If the agency is a corporation the copy shall be delivered as provided in paragraph (3) of this subdivision of this rule."

⁵⁴Bradley Lumber Co. v. National Labor Relations Board (C. C. A. 5th, 1936) 84 F. (2d) 97, cert. den. 299 U. S. 559, 81 L. Ed. 411, 57 S. Ct. 21.

⁵⁵International Molders Union v. National Labor Relations Board (D. C. E. D. Pa., 1939) 26 F. Supp. 423;

Remington Rand v. Lind (D. C. W. D. N. Y., 1936) 16 F. Supp. 666 (NLRB); Jamestown Veneer & Plywood Corp. v. National Labor Relations Board (D. C. W. D. N. Y., 1936) 13 F. Supp. 405.

⁵⁶Kentucky Natural Gas Corp. v. Public Service Commission (D. C. E. D. Ky., 1939) 28 F. Supp. 509.

^{56a}All statutes which contain the word "petition" for use in the district courts are modified by Rule 7 of the Rules of Civil Procedure, which specifies that, for pleadings, "there shall be a complaint. . . ."

⁵⁷28 USCA 45.

⁵⁸28 USCA 44.

⁵⁹Smith v. Illinois Bell Telephone Co. (1926) 270 U. S. 587, 70 L. Ed. 747, 46 S. Ct. 408.

CHAPTER 40

PLEADINGS, MOTIONS, INTERROGATORIES, AND STIPULATIONS

- § 726. Complaints in General.
- § 727. —Claim of Deprivation of Constitutional Rights Should Be Carefully Pleaded.
- § 728. —Rate Cases.
- § 729. —Claim of Denial of Opportunity to Know and Meet Opposing Claims.
- § 730. —Lack of Substantial Evidence.
- § 731. Answers.
- § 732. Motions.
- § 733. Interrogatories.
- § 734. Stipulations.

§ 726. Complaints in General.

Pleadings in suits involving judicial review have no special nature and are governed by the ordinary rules applicable to pleadings generally.¹ The complaint is by statute sometimes denominated "petition," but acquires no special characteristics by that name.² Where an "appeal" to the courts from an administrative order is the mode of review, it is said that the petition for appeal is the complaint.³

In general a complaint in a suit involving judicial review, must set forth allegations of fact which specifically raise the questions of law concerning which review is sought. Judicial review being on questions of law only, the function of the complaint is to serve as an assignment of errors as well as a statement of facts. Conduct of such

¹ Rule 7 (a) of the Federal Rules of Civil Procedure.

"Rule 7. Pleadings Allowed; Form of Motions

"(a) Pleadings. There shall be a complaint and an answer; and there shall be a reply, if the answer contains a counterclaim denominated as such; an answer to a cross-claim, if the answer contains a cross-claim; a third-party complaint, if leave is given under Rule 14 to summon a person who was not an original party; and there shall be a third-party an-

swer, if a third-party complaint is served. No other pleadings shall be allowed, except that the court may order a reply to an answer or a third-party answer."

² See, for instance, the Urgent Deficiencies Act, 28 USCA 45. However, the word "petition" has been changed to "complaint" by Rule 7(a) of the Federal Rules of Civil Procedure.

³ Public Service Commission v. Havemeyer (1936) 296 U. S. 506, 80 L. Ed. 357, 56 S. Ct. 360.

a suit primarily resembles the conduct of an appeal, except where a trial *de novo* is had. While common-law formality is not required, issues on judicial review of administrative action must be raised by pleadings rather than briefs.⁴ So far as concerns the enforcement of administrative orders, the court of original jurisdiction is a *nisi prius* tribunal, and complaint and answer should contain allegations of fact to frame the issues,⁵ and establish a case or controversy requiring exercise of the judicial power. The same is true of suits to enjoin enforcement of, suspend, annul, or set aside administrative orders. Thus an objection so fundamental as that an order of the Interstate Commerce Commission exceeds its jurisdiction insofar as it applies to intrastate movements, will not be considered on appeal where not pleaded.⁶

A complaint must ordinarily show that plaintiff has, or represents others having, a legal right or interest that will be injuriously affected by the order attacked,⁷ or other facts which establish legal standing to contest administrative action.⁸ Matters in the nature of evidence which ordinarily should be set forth in a bill of particulars need not however be disclosed, if allegations of ultimate fact establish legal standing to sue.⁹

It is good practice to attach to the complaint as exhibits exact copies of all administrative reports and orders involved, including any other reports and orders incorporated therein by reference. This serves the convenience of the court and all parties and removes questions as to the accuracy of the administrative findings and orders at the outset of the case. This practice is sanctioned by Rule 10 of the Federal Rules of Civil Procedure.¹⁰

⁴National Labor Relations Board v. Lund (C. C. A. 8th, 1939) 103 F. (2d) 815.

⁵National Labor Relations Board v. Biles Coleman Lumber Co. (C. C. A. 9th, 1938) 98 F. (2d) 18.

⁶Kansas City Southern R. Co. v. United States (1931) 282 U. S. 760, 75 L. Ed. 684, 51 S. Ct. 304.

⁷Moffat Tunnel League v. United States (1933) 289 U. S. 113, 77 L. Ed. 1069, 53 S. Ct. 543.

⁸See Florida Broadcasting Co. v. Federal Communications Commission (1939) 71 App. D. C. 231, 109 F. (2d) 668.

⁹Florida Broadcasting Co. v. Federal Communications Commission (1939) 71 App. D. C. 231, 109 F. (2d) 668. See Prendergast v. New York Telephone Co. (1923) 262 U. S. 43, 67 L. Ed. 853, 43 S. Ct. 466.

¹⁰Rule 10 (c) of the Federal Rules of Civil Procedure:

"Rule 10. Form of Pleadings

"(c) Adoption by Reference; Exhibits. Statements in a pleading may be adopted by reference in a different part of the same pleading or in another pleading or in any motion. A copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes."

An administrative finding relied on must be set forth in the complaint or it will not be considered by the court. This has especial application in suits to enforce administrative orders.¹¹

The acts of administrative agents, and their decisions and official documents, may be pleaded simply under Rule 9 of the Federal Rules of Civil Procedure.¹²

§ 727. — Claim of Deprivation of Constitutional Rights Should Be Carefully Pleased.

Where a party claims that it has been deprived of a constitutional right, it should set forth plainly by direct allegations in its complaint the facts by which it intends at the trial to establish the claim.¹³ Otherwise he may lose on the pleadings. The Supreme Court has frequently said, especially in confiscation cases, that a mere allegation of repugnance to the Fourteenth Amendment is not enough to state a cause of action to restrain the enforcement of a statute or administrative order.¹⁴ There is no right to a trial *de novo* even upon a constitutional question unless the pleadings on judicial review show

¹¹ National Labor Relations Board v. Sands Mfg. Co. (1939) 306 U. S. 332, 83 L. Ed. 682, 59 S. Ct. 508.

¹² Rule 9 (d) (e) of the Federal Rules of Civil Procedure:

“Rule 9. Pleading Special Matters
* * *

“(d) Official Document or Act. In pleading an official document or official act it is sufficient to aver that the document was issued or the act done in compliance with law.

“(e) Judgment. In pleading a judgment or decision of a domestic or foreign court, judicial or quasi-judicial tribunal, or of a board or officer, it is sufficient to aver the judgment or decision without setting forth matter showing jurisdiction to render it.”

¹³ Interstate Commerce Commission.

Beaumont, S. L. & W. R. Co. v. United States (1930) 282 U. S. 74, 75 L. Ed. 221, 51 S. Ct. 1.

National Labor Relations Board.

National Labor Relations Board v. Biles Coleman Lumber Co. (C. C. A. 9th, 1938) 98 F. (2d) 18.

Secretary of Agriculture.

Denver Union Stock Yard Co. v. United States (1938) 304 U. S. 470, 82 L. Ed. 1469, 58 S. Ct. 990.

State Agencies.

Borden's Farm Products Co. v. Baldwin (1934) 293 U. S. 194, 79 L. Ed. 281, 55 S. Ct. 187; Hegeman Farms Corp. v. Baldwin (1934) 293 U. S. 163, 79 L. Ed. 259, 55 S. Ct. 7; Public Service Commission v. Great Northern Utilities Co. (1933) 289 U. S. 130, 77 L. Ed. 1080, 53 S. Ct. 546; Aetna Ins. Co. v. Hyde (1928) 275 U. S. 440, 72 L. Ed. 357, 48 S. Ct. 174. See also Prendergast v. New York Telephone Co. (1923) 262 U. S. 43, 67 L. Ed. 853, 43 S. Ct. 466.

¹⁴ Borden's Farm Products Co. v. Baldwin (1934) 293 U. S. 194, 79 L. Ed. 281, 55 S. Ct. 187; Hegeman Farms Corp. v. Baldwin (1934) 293 U. S. 163, 79 L. Ed. 259, 55 S. Ct. 7; Public Service Commission v. Great Northern Utilities Co. (1933) 289 U. S. 130, 77 L. Ed. 1080, 53 S. Ct. 546; Aetna Ins. Co. v. Hyde (1928) 275 U. S. 440, 72 L. Ed. 357, 48 S. Ct. 174.

that the party complaining of administrative action has established a triable issue.¹⁵ The burden of showing arbitrariness is not sustained by making general allegations which are merely the general conclusions of law or fact. The facts which are relied upon to rebut the presumption of constitutionality must be specifically set forth. Thus a motion to dismiss, like a demurrer, admits only facts well pleaded.¹⁶

Where evidence taken by an agency is not before the court, and the general allegations of the bill state, in substance, the judgment of the pleader as to what such evidence did not establish or tend to establish, the allegations are utterly insufficient to justify the court in enjoining an order on the ground that the agency denied the hearing contemplated by the statute, or by its arbitrary action was guilty of an abuse of power.¹⁷ Nor is a reviewing court compelled to search the administrative record for undesignated error claimed upon an omnibus assertion.¹⁸ Where all the stock fire insurance companies in a state join in a suit to set aside a state rate order, and the complaint alleges that the aggregate return is confiscatory, but does not allege any facts to show that the rates are confiscatory as to any company, or that there is any joint interest, or that each company is so well and economically organized and carried on that all are entitled, as of right protected by the Constitution, to premiums amounting in the aggregate to enough to yield a reasonable return to all the companies, no federal question is presented.¹⁹ It is specifically not decided whether, on any state of facts, all would be jointly entitled to such protection.²⁰ A motion to strike the transcript of the record of the administrative hearing is not the proper way to bring before the court the contention that a fair hearing was denied, because the court must examine the merits of the case so as to understand the pertinency of excluded matter to the case as a whole.²¹

¹⁵ *Quon Quon Poy v. Johnson* (1927) 273 U. S. 352, 71 L. Ed. 680, 47 S. Ct. 346.

¹⁶ *Pacific States Box & Basket Co. v. White* (1935) 296 U. S. 176, 80 L. Ed. 138, 56 S. Ct. 159, 101 A. L. R. 853.

¹⁷ *Louisville & N. R. Co. v. Garrett* (1913) 231 U. S. 298, 58 L. Ed. 229, 34 S. Ct. 48.

¹⁸ *North Whittier Heights Citrus Ass'n v. National Labor Relations Board* (C. C. A. 9th, 1940) 109 F. (2d) 76, cert. den. 310 U. S. 632, 84

L. Ed. 1402, 60 S. Ct. 1075.

¹⁹ *Aetna Ins. Co. v. Hyde* (1928) 275 U. S. 440, 72 L. Ed. 357, 48 S. Ct. 174. See *American Commission Co. v. United States* (D. C. D. Colo., 1935) 11 F. Supp. 965 (Secy. of Agriculture).

²⁰ *Aetna Ins. Co. v. Hyde* (1928) 275 U. S. 440, 72 L. Ed. 357, 48 S. Ct. 174.

²¹ *California Lumbermen's Council v. Federal Trade Commission* (C. C. A. 9th, 1939) 103 F. (2d) 304.

The issue as to whether procedural due process has been denied may be raised by answer in a suit to enforce an administrative order, or in a complaint to enjoin enforcement of, suspend, annul, or set aside such an order.²²

§ 728. — Rate Cases.

An allegation merely asserting in general language that rates are confiscatory is insufficient. The facts relied on must be specifically set forth, and from them it must clearly appear that the rates would necessarily deny just compensation to the plaintiff and deprive it of its property without due process of law.²³ In state rate cases, failure to allege confiscation properly will be fatal to an attempt to appeal from the decision of the highest state court upholding an order. A mere allegation of denial of due process presents no federal question.²⁴ The jurisdiction of the Supreme Court to set aside state made rates will only be exercised in clear cases.²⁵ Confiscation is not alleged by the statement that rates are unreasonable and absurdly low.²⁶ A bill which does not show the value of the property employed, the expenses of operation, or the return which would be permitted under the rates prescribed, but which contains a mere allegation of loss of revenue, is insufficient. It may be supposed, other things being equal, that a reduction in rates found to be excessive will cause a loss in revenue. The question is not simply as to the amount of reduction, but whether the rates as fixed would allow a fair return.²⁷ And where

²² See *National Labor Relations Board v. Cherry Cotton Mills* (C. C. A. 5th, 1938) 98 F. (2d) 444.

²³ *Public Service Commission v. Great Northern Utilities Co.* (1933) 289 U. S. 130, 77 L. Ed. 1080, 53 S. Ct. 546; *Aetna Ins. Co. v. Hyde* (1928) 275 U. S. 440, 72 L. Ed. 357, 48 S. Ct. 174.

"It is a well-established rule that an allegation merely asserting in general language that rates are confiscatory is not sufficient and that, in order to invoke constitutional protection, the facts relied on must be specifically set forth and from them it must clearly appear that the rates would necessarily deny to plaintiff just compensation and deprive it of its property without due process of

law." (Mr. Justice Butler in *Public Service Commission v. Great Northern Utilities Co.* (1933) 289 U. S. 130, 136, 137, 77 L. Ed. 1080, 53 S. Ct. 546.)

²⁴ *Bell Telephone Co. v. Pennsylvania Public Utility Commission* (1940) 309 U. S. 30, 84 L. Ed. 563, 60 S. Ct. 411.

²⁵ *Aetna Ins. Co. v. Hyde* (1928) 275 U. S. 440, 72 L. Ed. 357, 48 S. Ct. 174.

²⁶ *Louisville & N. R. Co. v. Siler* (C. C. E. D. Ky., 1911) 186 F. Supp. 176, aff'd 231 U. S. 298, 58 L. Ed. 229, 34 S. Ct. 48.

²⁷ *Louisville & N. R. Co. v. Garrett* (1913) 231 U. S. 298, 58 L. Ed. 229, 34 S. Ct. 48.

it is contended that value has been set too low, it is not good pleading to allege that the values upon which the return was estimated are not the true values, but not to allege what the true values were. This does not properly tender the issue upon the question of value.²⁸ Thus the complaint should set forth the ultimate facts which furnish the basis for the relief sought, such as cost of property in service, cost of reproduction, fair and reasonable value, probable rate of return, and that such return is below a fair rate of return, rather than long statements of evidence on which such conclusions of fact rest.²⁹

§ 729. — Claim of Denial of Opportunity to Know and Meet Opposing Claims.

Since the constitutional principles of procedural due process are principles of substance rather than form,³⁰ the complaint must show that the substantial requirements of procedural due process have not been met. Unless it shows this fact, the fact that in some formal aspects the opportunity to know and meet opposing claims was denied has no legal significance. In other words, allegations of the particular ways in which such opportunity has been denied are of value only when they have a cumulative effect of substantial force. If, on the other hand, they show that, in substance, such opportunity has been afforded, allegations of isolated instances in which it was denied cannot give the bill legal sufficiency so far as denial of procedural due process is concerned. Thus it is proper to set forth in a complaint the series of acts which resulted in denial of the right to know and meet opposing claims.³¹ For instance, allegations that an examiner's report was refused and that there was no oral or written argument before the agency must be met and tried in an appropriate case.³²

§ 730. — Lack of Substantial Evidence.

That there was not substantial evidence to support an administrative finding must be taken as a fact from an appropriate allegation in a complaint upon a motion to dismiss directed to the face of the com-

²⁸ *Dayton-Goose Creek Ry. Co. v. United States* (1924) 263 U. S. 456, 68 L. Ed. 388, 44 S. Ct. 169, 33 A. L. R. 472.

²⁹ *Prendergast v. New York Telephone Co.* (1923) 262 U. S. 43, 67 L. Ed. 853, 43 S. Ct. 466.

³⁰ See § 274 et seq.

³¹ See the first two *Morgan* cases (1936) 298 U. S. 468, 80 L. Ed. 1288, 56 S. Ct. 906, and (1938) 304 U. S. 1, 82 L. Ed. 1129, 58 S. Ct. 773, rehearing denied 304 U. S. 23, 82 L. Ed. 1135, 58 S. Ct. 999.

³² *Morgan v. United States* (1936) 298 U. S. 468, 80 L. Ed. 1288, 56 S. Ct. 906.

plaint.³³ An allegation that an administrative finding is unsupported by evidence is a mere conclusion where the administrative record is before the court.³⁴

§ 731. Answers.

A party defending a suit for judicial review should raise issues by answer rather than in briefs.³⁵ In a suit to enforce an administrative order, denial of procedural due process may be pleaded as an affirmative defense.³⁶

Under Rule 13 of the Federal Rules of Civil Procedure, a wide variety of counterclaims may be interposed.

Suits brought under the Urgent Deficiencies Act ^{36a} are to suspend, enjoin, annul or set aside an order, and have a peculiar nature as such. The statute has been held to confer special jurisdiction confined to special issues, i. e., the validity of certain administrative orders. Hence counterclaims not arising out of or related to the subject matter of such a special suit have been held to be not properly interposed under Equity Rule 30.³⁷ For instance, a counterclaim based on a violation of section 1 (18) of the Interstate Commerce Act ³⁸ has been held insufficient to constitute a cause of action within the jurisdiction of a court specially convened under the Urgent Deficiencies Act.³⁹

§ 732. Motions.

Motions are made in suits involving judicial review as in other types of suits. In fact, motions to dismiss are perhaps more common since they raise the questions of law which comprise the issues. A motion for judgment on the pleadings, in suits for an injunction against confiscatory rates, may be made and granted in a proper case, as in other suits.⁴⁰

³³ The Chicago Junction Case (1924) 264 U. S. 258, 68 L. Ed. 667, 44 S. Ct. 317.

³⁴ Isthmian S. S. Co. v. United States (D. C. S. D. N. Y., 1931) 53 F. (2d) 251.

³⁵ National Labor Relations Board v. Biles Coleman Lumber Co. (C. C. A. 9th, 1938) 98 F. (2d) 18.

³⁶ National Labor Relations Board v. Biles Coleman Lumber Co. (C. C. A. 9th, 1938) 98 F. (2d) 18. See National Labor Relations Board v.

Cherry Cotton Mills (C. C. A. 5th, 1938) 98 F. (2d) 444.

^{36a} See § 633 et seq.

³⁷ Powell v. United States (1937) 300 U. S. 276, 81 L. Ed. 643, 57 S. Ct. 470.

³⁸ 49 USCA 1 (18).

³⁹ Powell v. United States (1937) 300 U. S. 276, 81 L. Ed. 643, 57 S. Ct. 470.

⁴⁰ Oklahoma Gas & Electric Co. v. Corporation Commission (D. C. W. D. Okla., 1932) 1 F. Supp. 966.

§ 733. Interrogatories.

Rule 33 of the Federal Rules of Civil Procedure provides for the service of and answers to interrogatories.⁴¹

An administrative agency may be ordered to file answers to interrogatories for discovery of methods used in the agency's proceedings which do not comply with the requisites of procedural due process.⁴² But interrogatories may be objected to where they do not adequately tend to establish denial of procedural due process.⁴³ Interrogatories may not be used to pry into the deliberations of members of an administrative agency, since these have the same immunity accorded to juries and other fact-finding tribunals.⁴⁴

§ 734. Stipulations.

An employer who signed a stipulation by which he consented to the entry of a decree enforcing an order of the National Labor Relations Board could not thereafter object to the entry of a consent order enforcing the Board's order, and could not go outside the provisions

⁴¹ Rule 33 of the Federal Rules of Civil Procedure:

"Rule 33. Interrogatories to Parties

"Any party may serve upon any adverse party written interrogatories to be answered by the party served or, if the party served is a public or private corporation or a partnership or association, by an officer thereof competent to testify in its behalf. The interrogatories shall be answered separately and fully in writing under oath. The answers shall be signed by the person making them; and the party upon whom the interrogatories have been served shall serve a copy of the answers on the party submitting the interrogatories within 15 days after the delivery of the interrogatories, unless the court, on motion and notice and for good cause shown, enlarges or shortens the time. Objections to any interrogatories may be presented to the court within 10 days after service thereof, with notice as in case of a motion; and answers shall be deferred until the ob-

jections are determined, which shall be at as early a time as is practicable. No party may, without leave of court, serve more than one set of interrogatories to be answered by the same party."

⁴² National Labor Relations Board.

Inland Steel Co. v. National Labor Relations Board (C. C. A. 7th, 1939) 105 F. (2d) 246; **National Labor Relations Board v. Cherry Cotton Mills* (C. C. A. 5th, 1938) 98 F. (2d) 444; *National Labor Relations Board v. Lane Cotton Mills Co.* (C. C. A. 5th, 1940) 108 F. (2d) 568.

Secretary of Agriculture.

See *Morgan v. United States* (1936) 298 U. S. 468, 80 L. Ed. 1288, 56 S. Ct. 906.

⁴³ *National Labor Relations Board v. Lane Cotton Mills Co.* (C. C. A. 5th, 1940) 108 F. (2d) 568; *Inland Steel Co. v. National Labor Relations Board* (C. C. A. 7th, 1939) 105 F. (2d) 246.

⁴⁴ *National Labor Relations Board v. Botany Worsted Mills* (C. C. A. 3d, 1939) 106 F. (2d) 263.

of the stipulation to show reasons for not following the express terms thereof.⁴⁵ Where a cease and desist order of the National Labor Relations Board had been made in pursuance of a formal stipulation of the parties, an employer thereafter objecting to proposed vacation of the order and suggesting that any further proceeding should be in the form of enforcement proceedings or pursuant to a proper and valid charge, is estopped from objecting to the enforcement of the order on petition of the Board to a court.⁴⁶

⁴⁵ National Labor Relations Board
v. Gerling Furniture Mfg. Co. (C. C.
A. 7th, 1939) 103 F. (2d) 663.

⁴⁶ National Labor Relations Board
v. Pure Oil Co. (C. C. A. 5th, 1939)
103 F. (2d) 497.

CHAPTER 41

REFERENCE TO SPECIAL MASTER

§ 735. In General.

In complex rate cases involving a claim of confiscation the practice of referring the issues to a competent master to hear and report is not uncommon,¹ and has been said to be the better practice.² Broad provisions for referring matters to masters are contained in Rule 53 of the Federal Rules of Civil Procedure.

A master's report is ordinarily brought before the court by motion to confirm the report and exceptions to any findings of fact or conclusions of law stated therein.³ The findings may then be scrutinized by the court of original jurisdiction, and if sustained by that court, may be examined upon appeal by an appellate court.⁴

¹ Interstate Commerce Commission.

Interstate Commerce Commission v. Union Pac. R. Co. (1912) 222 U. S. 541, 56 L. Ed. 308, 32 S. Ct. 108.

State Agencies.

McCart v. Indianapolis Water Co. (1938) 302 U. S. 419, 82 L. Ed. 336, 58 S. Ct. 324; Wabash Valley Electric Co. v. Young (1933) 287 U. S. 488, 77 L. Ed. 447, 53 S. Ct. 234; Galveston Electric Co. v. Galveston (1922) 258 U. S. 388, 66 L. Ed. 678, 42 S. Ct. 351; Lincoln Gas & Electric Light Co. v. Lincoln (1919) 250 U. S. 256, 63 L. Ed. 968, 39 S. Ct. 454; Denver v. Denver Union Water Co. (1918) 246 U. S. 178, 62 L. Ed. 649, 38 S. Ct. 278; Des Moines Gas Co. v. Des Moines (1915) 238 U. S. 153, 59 L. Ed. 1244, 35 S. Ct. 811; The Minnesota Rate

Cases (1913) 230 U. S. 352, 57 L. Ed. 1511, 33 S. Ct. 729; Knoxville v. Knoxville Water Co. (1909) 212 U. S. 1, 53 L. Ed. 371, 29 S. Ct. 148; International Ry. Co. v. Prendergast (D. C. W. D. N. Y., 1930) 52 F. (2d) 293; Cambridge Electric Light Co. v. Atwill (D. C. D. Mass., 1928) 25 F. (2d) 485.

² Chicago, M. & St. P. R. Co. v. Tompkins (1900) 176 U. S. 167, 44 L. Ed. 417, 20 S. Ct. 336.

³ See Denver v. Denver Union Water Co. (1918) 246 U. S. 178, 62 L. Ed. 649, 38 S. Ct. 278; International Ry. Co. v. Prendergast (D. C. W. D. N. Y., 1932) 1 F. Supp. 623.

⁴ Chicago, M. & St. P. R. Co. v. Tompkins (1900) 176 U. S. 167, 44 L. Ed. 417, 20 S. Ct. 336.

CHAPTER 42

INTERLOCUTORY AND TEMPORARY INJUNCTIONS AND TEMPORARY RESTRAINING ORDERS

§ 736. In General.

§ 737. Judicial Code Section 266 Cases: Single Judge May Grant Temporary Stay.

§ 738. —Interlocutory Injunction Invalid Unless Court Makes Findings of Fact and Conclusions of Law.

§ 739. Effect of Interlocutory Injunctions and Stays.

§ 736. In General.

Grammatically there are several types of interlocutory or temporary injunctions. Chief among them in the federal courts is the interlocutory injunction, designed to maintain the status quo pending final determination of the case. The interlocutory injunction is the subject of section 266 of the Judicial Code, relating to state administrative orders,¹ the Urgent Deficiencies Act^{1a} relating to orders of the Interstate Commerce Commission, Secretary of Agriculture, and other agencies, and other acts relating to judicial review of orders of federal administrative agencies.

The cases sometimes refer to an interlocutory injunction as a "preliminary" or "temporary" injunction.² It is not uncommon practice for the parties to stipulate that the case may be finally disposed of on application for an interlocutory injunction, where the facts can be fully developed on such application without proceeding to trial or final hearing.

Where, on an application for an interlocutory injunction against enforcement of an administrative order, the agency agreed not to take steps to enforce the order before the District Court's decision on said application, it is not necessary to grant a temporary injunction to protect the party from penalties for noncompliance during suit.³

¹ See § 672 et seq.

(1937) 302 U. S. 300, 82 L. Ed. 276, 58

^{1a} See § 633 et seq.

S. Ct. 199.

² See *Mayo v. Lakeland Highlands*

³ *Natural Gas Pipeline Co. v.*

Canning Co. (1940) 309 U. S. 310, 84

Slattery (1937) 302 U. S. 300, 82 L.

L. Ed. 774, 60 S. Ct. 517. But see

Ed. 276, 58 S. Ct. 199.

Natural Gas Pipeline Co. v. Slattery

Relief pendente lite against the operation of an administrative order may be granted, in an appropriate case, where the party attacking the order is not clearly without standing to do so.⁴ But preliminary injunctive relief against the operation of rates promulgated by state regulatory bodies is granted only when it is clearly demonstrated that the rates in their effect are confiscatory, and where there is such contrariety of opinions and disputes as to appraisals and methods as requires full examination and cross-examination to ascertain the correctness of the claims made, no interlocutory injunction will be granted.⁵ To warrant interference by means of an interlocutory injunction, it must appear that there is a reasonable probability that the utility will prevail upon final hearing.⁶ Where, however, the court could not determine, on the affidavits presented, whether the valuation and rates were confiscatory, an application for an interlocutory injunction was granted on the utility's execution of a bond conditioned for the return of excess charges, should they later be found to have been excessive.⁷ In passing upon the sufficiency of a bill seeking an interlocutory injunction, the court considers whether the injury to the public caused by suspending a challenged administrative order outweighs the injury to the plaintiffs which would result from a refusal to grant the relief.⁸ Where the effect of a preliminary injunction would be of a mandatory rather than a restraining character it will not be granted.⁹

A temporary restraining order may be issued pending the hearing and determination of an application for an interlocutory injunction.^{9a} A number of statutes provide that the institution of a suit for judicial review shall not, unless specifically ordered by the court, operate as a stay of the administrative order,¹⁰ while there are statutory pro-

⁴ *Saxton Coal Mining Co. v. National Bituminous Coal Commission* (1938) 68 App. D. C. 245, 96 F. (2d) 517.

⁵ *International Ry. Co. v. Prendergast* (D. C. W. D. N. Y., 1930) 52 F. (2d) 293; *Cambridge Electric Light Co. v. Atwill* (D. C. D. Mass., 1928) 25 F. (2d) 485.

⁶ *Cambridge Electric Light Co. v. Atwill* (D. C. D. Mass., 1928) 25 F. (2d) 485.

⁷ *Ohio Bell Telephone Co. v. Public Utilities Commission* (D. C. S. D. Ohio, E. Div., 1924) 3 F. (2d) 701;

Indiana General Service Co. v. McCordle (D. C., S. D. Ind., 1932) 1 F. Supp. 113.

⁸ *Snively Groves, Inc. v. Florida Citrus Commission* (D. C., N. D. Fla., 1938) 23 F. Supp. 600.

⁹ *Brand v. Pennsylvania R. Co.* (D. C. E. D. Pa., 1938) 22 F. Supp. 569.

^{9a} See Rule 65 of the Federal Rules of Civil Procedure.

¹⁰ *Board of Tax Appeals*.

See 26 USCA 1145.

Civil Aeronautics Authority.

See the Civil Aeronautics Act of 1938, 49 USCA 646 (d).

visions for an automatic stay by reason of commencement of the proceedings.¹¹

Logically, therefore, there are three types of injunctions, (1) a temporary stay or restraining order, effective pending application for an interlocutory injunction, (2) an "interlocutory," "preliminary," or "temporary" injunction, effective pending final disposition of the case, and (3) a permanent injunction, which finally disposes of a case.^{11a}

Statutory provisions deal with the questions of notice to opponents of applications for temporary restraining orders and interlocutory injunctions, and security upon their issuance.^{11b}

§ 737. Judicial Code Section 266 Cases: Single Judge May Grant Temporary Stay.

While three judges are required to grant an interlocutory injunction in cases arising under section 266 of the Judicial Code,¹² a single judge has power in such a case to grant a temporary stay or restraining order against enforcement of the administrative action assailed until the hearing and determination of the application for an interlocutory injunction.¹³ But the power of a single judge in such cases is then at an end. He may not vacate the stay created by his own order,¹⁴ nor may he grant a further stay pending appeal of an order

Federal Power Commission.

Federal Power Act, 16 USCA 825-1 (c); Natural Gas Act, 15 USCA 717-1 (c).

National Labor Relations Board.

National Labor Relations Act, 29 USCA 160 (g).

Secretary of Agriculture.

The Agricultural Adjustment Act of 1937, 7 USCA 1367; The Agricultural Adjustment Act of 1938, 7 USCA 1367; Federal Food, Drug & Cosmetic Act, 21 USCA 355 (h).

Secretary of the Interior.

Bituminous Coal Act of 1937, 15 USCA 836 (b).

Secretary of War.

33 USCA 520.

Securities and Exchange Commission.

Securities Act of 1933, 15 USCA 77-1 (b); Securities Exchange Act of 1934, 15 USCA 78 y (b); Public Utility Holding Company Act of 1936,

15 USCA 79 x (b). See the Investment Company Act of 1940, 15 USCA 80a-42 (b); the Investment Advisers Act of 1940, 15 USCA 80b-13 (b).

Wage and Hour Administrator.

Fair Labor Standards Act, 29 USCA 210 (b).

11 Secretary of the Treasury.

The Federal Alcohol Administration Act, 27 USCA 204 (h).

11a See Rule 65 of the Federal Rules of Civil Procedure.

11b 28 USCA 381, 382.

12 See § 672 et seq.

13 *Cumberland Telephone & Telegraph Co. v. Louisiana Public Service Commission* (1922) 260 U. S. 212, 67 L. Ed. 217, 43 S. Ct. 75.

14 *Cumberland Telephone & Telegraph Co. v. Louisiana Public Service Commission* (1922) 260 U. S. 212, 67 L. Ed. 217, 43 S. Ct. 75.

of the three-judge court denying an interlocutory injunction, or otherwise extend the temporary stay or restraining order.¹⁵

§ 738. — Interlocutory Injunction Invalid Unless Court Makes Findings of Fact and Conclusions of Law.

Under Judiciary Code section 266 no interlocutory injunction can stand if the three-judge court does not make findings of fact and set forth conclusions of law to support the decree. In their absence the decree will, on appeal to the Supreme Court, be vacated, and the cause remanded to the district court.¹⁶ Such a statement of grounds of decision, as to both fact and law, is always desirable on appeal so that the appellate court may be adequately advised; and particularly where the decree, interlocutory or final, enjoins the enforcement of a state law or the action of state officials under state law. For then the respect due to the state demands that the need for nullifying the action of its legislature or of its executive officials be persuasively shown. It was to insure careful and deliberate action upon such interlocutory applications that Congress required that they should be heard before three judges.¹⁷ This requirement of opinion and findings was not altered by the adoption of the same requirement in Equity Rule 70½, because the Rule did not apply to interlocutory injunctions.¹⁸

¹⁵ *Cumberland Telephone & Telegraph Co. v. Louisiana Public Service Commission* (1922) 260 U. S. 212, 67 L. Ed. 217, 43 S. Ct. 75.

¹⁶ *Public Service Commission v. Wisconsin Telephone Co.* (1933) 289 U. S. 67, 77 L. Ed. 1036, 53 S. Ct. 514.

"It is true, as the appellee contends, that the terms of Equity Rule 70½, relating to decisions of suits in equity, apply to decisions upon final hearing and do not embrace decisions upon interlocutory applications. But the duty of the court in dealing with interlocutory applications, to which this Court had previously directed attention, was not altered by the adoption of that rule. While an application for an interlocutory injunction does not involve a final determination of the merits, it does involve the exercise of a sound judicial discretion. That discretion can be exercised only upon a determination, in the light of the issues

and of the facts presented, whether the complainant has made, or has failed to make, such a showing of the gravity of his complaint as to warrant interlocutory relief. Thus, if the issue is confiscation, the complainant must make a factual showing of the probable confiscatory effect of the statute or order with such clarity and persuasiveness as to demonstrate the propriety in the interest of justice, and in order to prevent irreparable injury, of restraining the State's action until hearing upon the merits can be had." (Mr. Chief Justice Hughes in *Public Service Commission v. Wisconsin Telephone Co.* (1933) 289 U. S. 67, 70, 71, 77 L. Ed. 1036, 53 S. Ct. 514.)

¹⁷ *Public Service Commission v. Wisconsin Telephone Co.* (1933) 289 U. S. 67, 77 L. Ed. 1036, 53 S. Ct. 514.

¹⁸ *Public Service Commission v. Wisconsin Telephone Co.* (1933) 289 U. S. 67, 77 L. Ed. 1036, 53 S. Ct. 514.

Indeed Rule 52 of the new Federal Rules of Civil Procedure which substantially continues Rule 70½, specifically includes the requirement in "granting or refusing interlocutory injunctions:"¹⁹

§ 739. Effect of Interlocutory Injunctions and Stays.

A permanent injunction against an administrative order or its enforcement completely vitiates thereafter any possible legal effect of the order. Similarly a "preliminary," "temporary," or "interlocutory" injunction, stay or restraining order, of equivalent import frees the petitioner, during the period of its effectiveness, from any duty to obey the administrative order in question,²⁰ even if, upon appeal, it be held that the interlocutory injunction was improvidently granted.²¹ The legal effect of an order is a prime judicial question, within the judicial sphere, and once adjudicated by a court by reason of the issuance of an injunction or stay, even for a particular period only, must be adhered to by administrative agencies and the other branches of the government.²²

¹⁹ See § 784.

²⁰ "The District Court had, when it issued the injunction, jurisdiction of the parties and of the subject matter; and it has never relinquished its jurisdiction. It is true that this Court has held that the interlocutory decree was improvidently granted. But it did not declare that the decree was void. (274 U. S. 588, 591-592.) Compare *Arkansas Comm'n v. Chicago, Rock Island & Pacific R. R. Co.*, 274 U. S. 597, 598. The interlocutory injunction, until dissolved by our decision, was in full force and effect. The appellants refused to assume the risk attendant upon suspending the decree by means of a supersedeas

bond. The appeal did not operate as a supersedeas. *Hovey v. McDonald*, 109 U. S. 150, 161; *Leonard v. Ozark Land Co.*, 115 U. S. 465. Compare *Virginian Ry. v. United States*, 272 U. S. 658, 668-669.

"Thus, the interlocutory decree relieved the Railway from any duty to obey the restraining order of the Commission." (Mr. Justice Brandeis in *Lawrence v. St. Louis-San Francisco Ry. Co.* (1929) 278 U. S. 228, 232, 233, 73 L. Ed. 282, 49 S. Ct. 106.)

²¹ *Lawrence v. St. Louis-San Francisco Ry. Co.* (1929) 278 U. S. 228, 73 L. Ed. 282, 49 S. Ct. 106.

²² See §§ 41, 73, 257-259, 425 et seq.

CHAPTER 43

SEGREGATION OF FUNDS IN DISPUTE PENDING FINAL DISPOSITION

I. SEGREGATION OF FUNDS

§ 740. In General.

§ 741. Posting of Bond as Alternative.

II. DISPOSITION OF SEGREGATED FUNDS

§ 742. Disposition of Funds Must Await Final Disposition of Question of Ownership.

§ 743. Rules for Disposition.

§ 744. —Where Order Invalidated for Lack of Procedural Due Process.

I. SEGREGATION OF FUNDS

§ 740. In General.

Funds which are segregated or impounded in rate litigation represent the differences between rates collected and lower rates prescribed by an administrative order whose enforcement has been temporarily enjoined. The ultimate disposition of such funds depends primarily upon the validity of the administrative order.¹ Such funds may, as a condition of granting some form of temporary or interlocutory injunction against enforcement of an administrative order,² or a stay thereof pending appeal,³ be impounded by the district court or a custodian appointed by the agency.⁴ Pending completion of the legislative process an administrative stay of equivalent import may be conditioned upon impounding of the funds in dispute.⁵

1 * *United States v. Morgan* (1939) 307 U. S. 183, 83 L. Ed. 1211, 59 S. Ct. 795; *Inland Steel Co. v. United States* (1939) 306 U. S. 153, 83 L. Ed. 557, 59 S. Ct. 415. See also *Newton v. Consolidated Gas Co.* (1924) 265 U. S. 78, 68 L. Ed. 909, 44 S. Ct. 481.

2 *Smith v. Illinois Bell Telephone Co.* (1930) 282 U. S. 133, 75 L. Ed. 255, 51 S. Ct. 65; *Prendergast v. New York Telephone Co.* (1923) 262 U. S. 43, 67 L. Ed. 853, 43 S. Ct. 466.

3 *Beaumont, S. L. & W. R. Co. v. United States* (1930) 282 U. S. 74, 75 L. Ed. 221, 51 S. Ct. 1.

4 *Central Kentucky Natural Gas Co. v. Railroad Commission of Kentucky* (1933) 290 U. S. 264, 78 L. Ed. 307, 54 S. Ct. 154.

5 *Dayton Power & Light Co. v. Public Utilities Commission* (1934) 292 U. S. 290, 78 L. Ed. 1267, 54 S. Ct. 647.

Questions concerning the disposition of funds in dispute in rate litigation, pursuant to a mandate of the Supreme Court, are appealable to the Circuit Court of Appeals even though decided by a three-judge court convened pursuant to section 266 of the Judicial Code.⁶

§ 741. Posting of Bond as Alternative.

It is common practice for the utility to post a bond for the proper disposition of revenues in excess of those set by the agency, if the utility retains control over the funds, as an alternative to impounding or segregation of the funds upon the issuance of an injunction or stay of interlocutory nature.⁷ Where surety bonds have been substituted for impounded funds, premiums therefor are taxable as costs to the defeated party, at least in the presence of a rule of court or usage to that effect.⁸ A decree taxing as costs to the losing party premiums for surety bonds substituted for impounded funds is one of the exceptions to the general rule forbidding appeals from decrees for costs only. It has all the characteristics of finality.⁹

II. DISPOSITION OF SEGREGATED FUNDS

§ 742. Disposition of Funds Must Await Final Disposition of Question of Ownership.

The court cannot pay over moneys impounded to the party who deposited them and whose attack upon a particular order has been successful, until final disposition of the question of ownership.¹⁰ If new administrative proceedings have been instituted and are pending in regard to the same subject matter, distribution cannot be made

⁶ *Illinois Bell Telephone Co. v. Slattery* (C. C. A. 7th, 1939) 102 F. (2d) 58, cert. den. 307 U. S. 648, 83 L. Ed. 1527, 59 S. Ct. 1045; *Illinois Bell Telephone Co. v. Slattery* (C. C. A. 7th, 1938) 98 F. (2d) 930. See also § 672 et seq.

⁷ *Dayton Power & Light Co. v. Public Utilities Commission* (1934) 292 U. S. 290, 78 L. Ed. 1267, 54 S. Ct. 647; *Lindheimer v. Illinois Bell Telephone Co.* (1934) 292 U. S. 151, 78 L. Ed. 1182, 54 S. Ct. 658; *Beaumont, S. L. & W. R. Co. v. United States* (1930) 282 U. S. 74, 75 L. Ed. 221, 51 S. Ct. 1; * *Newton v. Consolidated Gas Co.*

(1924) 265 U. S. 78, 68 L. Ed. 909, 44 S. Ct. 481; *Prendergast v. New York Telephone Co.* (1923) 262 U. S. 43, 67 L. Ed. 853, 43 S. Ct. 466; * *Ex parte Lincoln Gas & Electric Light Co.* (1921) 256 U. S. 512, 65 L. Ed. 1066, 41 S. Ct. 558.

⁸ *Newton v. Consolidated Gas Co.* (1924) 265 U. S. 78, 68 L. Ed. 909, 44 S. Ct. 481.

⁹ *Newton v. Consolidated Gas Co.* (1924) 265 U. S. 78, 68 L. Ed. 909, 44 S. Ct. 481.

¹⁰ *United States v. Morgan* (1939) 307 U. S. 183, 83 L. Ed. 1211, 59 S. Ct. 795.

until the agency, proceeding with due expedition, has entered a final order in the proceedings.¹¹ This principle applies even where new administrative proceedings have not been instituted if it is apparent that the funds should be retained until the institution and disposition within a reasonable time of further administrative proceedings, as for instance where the judicial inquiry is limited to part only of the period in which the fund was collected.¹²

§ 743. Rules for Disposition.

When the validity of an administrative order reducing rates is judicially upheld the moneys in dispute which have been impounded are refunded to those who paid them.¹³ If, on the other hand the order is finally held invalid on the merits, moneys impounded are ordinarily returned to the utility, or, if they have been segregated by the utility under bond, its liability under the bond ceases and it obtains absolute title to the moneys free from obligation to repay.

Moneys impounded pending a determination that lower rates prescribed by administrative order were confiscatory should be returned to the utility if failure to return all the funds would result in a rate of return to the utility so low as to be confiscatory. But if it appears that the return to the utility of part only of the impounded funds will still bring a fair return, disposition may await, in a proper case, further administrative determination of rates for the period in question.¹⁴ Where the claim of confiscation is upheld and funds have been impounded as the result of the collection of rates for several years, it may be necessary to await further administrative determination of valid rates for each of the several years in question in order that equitable distribution of the funds may be made.¹⁵ In holding that rates are confiscatory, a court may never prescribe or fix a rate, as the prescribing of rates is a legislative function. The judicial function is exhausted when particular rates are found to be confiscatory.¹⁶

¹¹ *United States v. Morgan* (1939) 307 U. S. 183, 83 L. Ed. 1211, 59 S. Ct. 795.

¹² *Central Kentucky Natural Gas Co. v. Railroad Commission of Kentucky* (1933) 290 U. S. 264, 78 L. Ed. 307, 54 S. Ct. 154.

¹³ *Inland Steel Co. v. United States* (1939) 306 U. S. 153, 83 L. Ed. 557, 59 S. Ct. 415; **Ex parte Lincoln Gas & Electric Co.* (1921) 256 U. S. 512, 65 L. Ed. 1066, 41 S. Ct. 558.

¹⁴ *Central Kentucky Natural Gas Co. v. Railroad Commission of Kentucky* (1933) 290 U. S. 264, 78 L. Ed. 307, 54 S. Ct. 154.

¹⁵ *Smith v. Illinois Bell Telephone Co.* (1930) 282 U. S. 133, 75 L. Ed. 255, 51 S. Ct. 65.

¹⁶ *Central Kentucky Natural Gas Co. v. Railroad Commission of Kentucky* (1933) 290 U. S. 264, 78 L. Ed. 307, 54 S. Ct. 154. See also § 528.

Impounded funds are as a rule disposed of by a district or other court of original jurisdiction.¹⁷ Where the order is held invalid because the administrative proceedings upon which it is based were conducted without application of the requisite standards of procedural due process, the Supreme Court will leave all questions of disposition of the moneys impounded to the district court in the first instance.¹⁸ Where funds have been impounded pending appeal, the Appellate Court's direction to the lower court to take such proceedings as justice may require supports retention of the case and disposition of the funds by the lower court.¹⁹

§ 744. — Where Order Invalidated for Lack of Procedural Due Process.

An administrative order which is enjoined by judicial decree is not always a complete nullity. Even though voidable for lack of procedural due process it may not always be ignored without incurring penalties for disobedience to the statute.²⁰ The mere fact that an order has been set aside for a procedural defect does not preclude further findings on the same subject matter which the reviewing court may take into account and which may compel it to stay distribution of the moneys in dispute pending a final determination in the administrative proceedings.²¹ If this final administrative determination is valid the court is then under a duty to dispose of the funds in accordance with it even though they were impounded under a former order previously held invalid and retained in custody under the finding of an agency without power to make an order disposing of the funds.²²

The rule requiring that disposition of funds await final disposition of the litigation arises out of the function of the reviewing courts. First, courts are coordinate and interdependent means, with the agencies, of effecting the policy of the statute.²³ Second, whether

¹⁷ *United States v. Morgan* (1939) 307 U. S. 183, 83 L. Ed. 1211, 59 S. Ct. 795.

¹⁸ *United States v. Morgan* (1939) 307 U. S. 183, 83 L. Ed. 1211, 59 S. Ct. 795; *Morgan v. United States* (1938) 304 U. S. 1, 82 L. Ed. 1129, 58 S. Ct. 773, rehearing denied 304 U. S. 23, 82 L. Ed. 1135, 58 S. Ct. 999.

¹⁹ *Ex parte Lincoln Gas & Electric Light Co.* (1921) 256 U. S. 512, 65 L. Ed. 1066, 41 S. Ct. 558.

²⁰ *United States v. Morgan* (1939) 307 U. S. 183, 83 L. Ed. 1211, 59 S. Ct. 795.

²¹ *United States v. Morgan* (1939) 307 U. S. 183, 83 L. Ed. 1211, 59 S. Ct. 795.

²² *United States v. Morgan* (1939) 307 U. S. 183, 83 L. Ed. 1211, 59 S. Ct. 795.

²³ *United States v. Morgan* (1939) 307 U. S. 183, 83 L. Ed. 1211, 59 S. Ct. 795.

acting under a specific statute or otherwise, they sit generally as courts of equity and are bound by the traditional rules of equity.²⁴ Both these facts and the policy of the act impose a duty upon the courts to dispose equitably of funds in their custody upon termination of the litigation.²⁵ This duty involves the duty of avoiding unlawful disposition in the interim.²⁶ The duty to do equity is more imperative where the court's injunction deprives the public of the benefit of lower rates, obstructs the agency's making of a reparation order, or otherwise frustrates the policy of the statute.²⁷ It is familiar doctrine that both the extent to which a court of equity may grant or withhold its aid and the manner of moulding its remedies may be affected by the public interest involved.²⁸ Congress having established public policy by the statute, a court of equity should be astute to prevent the use of its process in contravention of that policy.²⁹

²⁴ United States v. Morgan (1939)
307 U. S. 183, 83 L. Ed. 1211, 59 S.
Ct. 795. See also §§ 253, 254.

²⁵ United States v. Morgan (1939)
307 U. S. 183, 83 L. Ed. 1211, 59 S.
Ct. 795; Inland Steel Co. v. United
States (1939) 306 U. S. 153, 83 L. Ed.
557, 59 S. Ct. 415.

²⁶ United States v. Morgan (1939)
307 U. S. 183, 83 L. Ed. 1211, 59 S.
Ct. 795.

²⁷ United States v. Morgan (1939)
307 U. S. 183, 83 L. Ed. 1211, 59 S.
Ct. 795.

²⁸ United States v. Morgan (1939)
307 U. S. 183, 83 L. Ed. 1211, 59 S.
Ct. 795.

²⁹ United States v. Morgan (1939)
307 U. S. 183, 83 L. Ed. 1211, 59 S.
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CHAPTER 44

TRIAL OR FINAL HEARING

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I. PRACTICE

A. *On Trial De Novo*

§ 745. Court Must Make Independent Judgment on Facts and Law.

Upon trial *de novo* of a constitutional question the reviewing court must hear and weigh all competent evidence, receiving, if necessary, relevant evidence outside the administrative record bearing on the constitutional question,¹ and reach its independent judgment on the facts and on the law.² A district court's finding on judicial review that certain rates are not confiscatory, where it considered evidence outside the administrative record and all the evidence required a finding that the rates prescribed were not confiscatory, requires that the administrative order be upheld even though the district court erroneously stated that the complainant was not entitled to a trial *de novo*.³

¹ *St. Joseph Stock Yards Co. v. United States* (1936) 298 U. S. 38, 80 L. Ed. 1033, 56 S. Ct. 720; *Chicago, B. & Q. R. Co. v. Osborne* (1924) 265 U. S. 14, 68 L. Ed. 878, 44 S. Ct. 431.

² *Secretary of Agriculture.*

* *St. Joseph Stock Yards Co. v. United States* (1936) 298 U. S. 38, 80 L. Ed. 1033, 56 S. Ct. 720. See *Spano v. Western Fruit Growers* (C. C. A. 10th, 1936) 83 F. (2d) 150.

State Agencies.

State Corporation Commission v. Wichita Gas Co. (1934) 290 U. S. 561, 78 L. Ed. 500, 54 S. Ct. 321; *Chicago, B. & Q. R. Co. v. Osborne* (1924) 265 U. S. 14, 68 L. Ed. 878, 44 S. Ct. 431.

Workmen's Compensation Cases.

Crowell v. Benson (1932) 285 U. S. 22, 76 L. Ed. 598, 52 S. Ct. 285.

³ *St. Joseph Stock Yards Co. v. United States* (1936) 298 U. S. 38, 80 L. Ed. 1033, 56 S. Ct. 720.

The judicial duty of rendering an independent judgment on a constitutional question, both on the facts and the law, must be performed in the light of the proceedings already had and may be greatly facilitated by the assembling and analysis of the facts in the course of the administrative determination. Judicial judgment may be none the less appropriately independent because informed and aided by the sifting procedure of an expert legislative agency. Indeed, judicial scrutiny must of necessity take into account the entire legislative process used by the agency in making its determination, including the reasoning and findings upon which the legislative action rests.⁴

§ 746. Trial De Novo Is of Facts Existing at Date Thereof.

Trial *de novo* should be had with a view to setting forth the facts as they exist at the time of trial in the district court, or as nearly as they may be ascertained as of that time.⁵ Where an appealed case is sent back to the district court for a new hearing on the question of confiscation, an entirely new trial *de novo* must be had, and all questions pertaining to the issue of confiscation are open anew, as of the time of the new trial.⁶

§ 747. Mode of Presenting Evidence.

It is proper practice upon trial *de novo* to offer into evidence the agency's findings and the administrative record of evidence, together with any new evidence desired.⁷ In ordinary cases this can be accomplished by offering into evidence as exhibits the agency's report and order in question and the entire administrative record, or so much thereof as is relevant. Either party may show by competent testimony any fact brought out before the agency which may throw light on the issue of confiscation.⁸ This may be done by affidavit, so as to make possible judicial decision on the judicial issue of confiscation upon the pleadings and affidavits.⁹ But a party's right on trial *de novo* to challenge the administrative findings is not conditioned upon

⁴ St. Joseph Stock Yards Co. v. Texas (1938) 303 U. S. 123, 82 L. Ed. 702, 58 S. Ct. 483, rehearing denied 303 U. S. 667, 82 L. Ed. 1124, 58 S. Ct. —.

⁵ Baltimore & O. R. Co. v. United States (1936) 298 U. S. 349, 80 L. Ed. 1209, 56 S. Ct. 797.

⁶ McCart v. Indianapolis Water Co. (1938) 302 U. S. 419, 82 L. Ed. 336, 58 S. Ct. 324.

⁷ United Gas Public Service Co. v. Ed. 853, 43 S. Ct. 466.

⁸ Prendergast v. New York Telephone Co. (1923) 262 U. S. 43, 67 L. Ed. 853, 43 S. Ct. 466.

⁹ Prendergast v. New York Telephone Co. (1923) 262 U. S. 43, 67 L. Ed. 853, 43 S. Ct. 466.

the production of the evidence taken in the administrative proceedings.¹⁰

Where the opportunity is open, all pertinent evidence should be submitted in the first instance to the administrative agency. The course of withholding from the agency essential portions of the evidence that is relied on in court to show that a rate is confiscatory, or that a party has otherwise been deprived of a constitutional right, will find no favor in the courts. In fact, it will require a clear case, clearer than otherwise, to justify a court in annulling administrative action as depriving a party of a constitutional right, upon evidence newly adduced but not in a proper sense newly discovered.¹¹ In general, however, a party may wait until a law is passed or a regulation is made and then insist upon his constitutional rights. And when the agency contends that the plaintiff is entitled to no compensation for certain property, to offer evidence as to it would be an idle form.¹²

In suits brought under section 266 of the Judicial Code¹³ requiring three judges for disposition of the case, testimony may, by agreement of the parties, be taken before a single judge.¹⁴

§ 748. Practice on Trial De Novo by Jury.

In the federal courts confiscation, and other constitutional issues, are usually tried in an equity suit before three judges or a single judge. The state of Texas, however, provides for trial *de novo* by jury. This has been held to be valid under the requirements of procedural due process of the Federal Constitution, despite the obvious difficulty of presenting to a jury the complicated issues in a rate case, involving voluminous evidence, conflicting expert testimony, and a host of details in appraisals.¹⁵ Such issues and evidence are, however, no more complex than those in patent cases at law presenting

¹⁰ Spano v. Western Fruit Growers (C. C. A. 10th, 1936) 83 F. (2d) 150.

¹¹ St. Joseph Stock Yards Co. v. United States (1936) 298 U. S. 38, 80 L. Ed. 1033, 56 S. Ct. 720.

¹² San Joaquin & Kings River Canal & Irrigation Co. v. Stanislaus County (1914) 233 U. S. 454, 58 L. Ed. 1041, 34 S. Ct. 652. Compare § 226 et seq.

¹³ See § 672 et seq.

¹⁴ Illinois Bell Telephone Co. v.

Moynihan (D. C. N. D. Ill., 1930) 38 F. (2d) 77, modified 282 U. S. 133, 75 L. Ed. 255, 51 S. Ct. 64.

¹⁵ Lone Star Gas Co. v. Texas (1938) 304 U. S. 224, 82 L. Ed. 1304, 58 S. Ct. 883, rehearing denied 304 U. S. 224, 82 L. Ed. 1549, 58 S. Ct. 1051; * United Gas Public Service Co. v. Texas (1938) 303 U. S. 123, 82 L. Ed. 702, 58 S. Ct. 483, rehearing denied 303 U. S. 667, 82 L. Ed. 1124, 58 S. Ct. —.

issues of validity and infringement, or in criminal cases.¹⁶ The time-honored method of resolving questions of fact by a jury need never be abandoned under compulsion of the Federal Constitution.¹⁷

§ 749. — Instructions to Jury.

The question of confiscation is properly put to a jury under an instruction that it must determine whether or not the rate prescribed was "unreasonable and unjust as to the defendant." This instruction adequately poses the question whether the prescribed rate "was so low as not to have provided for a fair return upon the fair value of defendant's property used and useful in supplying the service," and thus whether the rate prescribed is confiscatory.¹⁸

Rate of return: A jury charge that the rate of return should be "reasonably sufficient to assure confidence in the financial soundness of the utility and should be adequate under efficient and economical management to maintain and support its credit and enable it to raise money necessary for the proper discharge of its duties" is proper.¹⁹ A proper instruction is that "fair return" means that the company "was entitled to earn a rate on the present fair value of its property which it employs for the convenience of the public equal to that generally being made at the same time within the same general part of the country upon investments in other business undertakings which are attended by like risks and uncertainties."²⁰

"Fair value": A jury charge that "fair value" meant "the reasonable worth of the property at this time that is being used and useful in the public service," is proper.²¹

"Used and useful": A jury charge that "used and useful" means "that it embraces all the property 'actually being used' in that serv-

¹⁶ *United Gas Public Service Co. v. Texas* (1938) 303 U. S. 123, 82 L. Ed. 702, 58 S. Ct. 483, rehearing denied 303 U. S. 667, 82 L. Ed. 1124, 58 S. Ct. —.

¹⁷ *United Gas Public Service Co. v. Texas* (1938) 303 U. S. 123, 82 L. Ed. 702, 58 S. Ct. 483, rehearing denied 303 U. S. 667, 82 L. Ed. 1124, 58 S. Ct. —.

¹⁸ *United Gas Public Service Co. v. Texas* (1938) 303 U. S. 123, 82 L. Ed. 702, 58 S. Ct. 483, rehearing denied 303 U. S. 667, 82 L. Ed. 1124, 58 S. Ct. —; *Lone Star Gas Co. v. Texas* (1938) 304 U. S. 224, 82 L. Ed. 1304, 58 S. Ct. 883, rehearing denied 304

U. S. 224, 82 L. Ed. 1549, 58 S. Ct. 1051.

¹⁹ *United Gas Public Service Co. v. Texas* (1938) 303 U. S. 123, 82 L. Ed. 702, 58 S. Ct. 483, rehearing denied 303 U. S. 667, 82 L. Ed. 1124, 58 S. Ct. —.

²⁰ *United Gas Public Service Co. v. Texas* (1938) 303 U. S. 123, 82 L. Ed. 702, 58 S. Ct. 483, rehearing denied 303 U. S. 667, 82 L. Ed. 1124, 58 S. Ct. —.

²¹ *United Gas Public Service Co. v. Texas* (1938) 303 U. S. 123, 82 L. Ed. 702, 58 S. Ct. 483, rehearing denied 303 U. S. 667, 82 L. Ed. 1124, 58 S. Ct. —.

ice and also such property as was reasonably necessary to permit 'continuous and efficient service' " is proper.²²

Operation expenses: A jury charge that "operation expenses" meant "such expenses as were incurred in the operation of appellant's property in furnishing gas to the people of Laredo," is proper.²³

Depreciation: A jury charge that "annual depreciation" meant the "amount per annum that was reasonably necessary to compensate for the wearing out and any necessary replacements and retirements of appellant's property," is proper.²⁴

Reproduction cost: A jury charge that "reproduction cost new" means "the cost to the owner under the conditions which may reasonably be expected to exist if the property were to be reproduced new," is proper.²⁵

Going value: A jury charge that "going value" meant "the added value of appellant's property as a whole, used and useful for serving the city, over the sum of the values of its component parts, by reason of the fact that it is an operating, assembled and established property, functioning with a trained personnel, a co-ordinated plant and property, with customers attached, and its business established," is proper.²⁶

§ 750. — Importance of Requests to Charge.

Upon trial *de novo* by jury of the issue of confiscation, a party assailing the administrative order who makes no specific requests to charge is in a poorer position to object to the charge on the ground that he has been denied procedural due process, than if he had requested amplified instructions.²⁷

§ 751. — Right to Framing of Special Issues for the Jury.

A complaining party is not entitled under the Federal Constitution to the framing of special issues for trial by jury in a state court, and

²² United Gas Public Service Co. v. Texas (1938) 303 U. S. 123, 82 L. Ed. 702, 58 S. Ct. 483, rehearing denied 303 U. S. 667, 82 L. Ed. 1124, 58 S. Ct. —.

²³ United Gas Public Service Co. v. Texas (1938) 303 U. S. 123, 82 L. Ed. 702, 58 S. Ct. 483, rehearing denied 303 U. S. 667, 82 L. Ed. 1124, 58 S. Ct. —.

²⁴ United Gas Public Service Co. v. Texas (1938) 303 U. S. 123, 82 L. Ed. 702, 58 S. Ct. 483, rehearing denied 303 U. S. 667, 82 L. Ed. 1124, 58 S. Ct. —.

²⁵ United Gas Public Service Co. v. Texas (1938) 303 U. S. 123, 82 L. Ed. 702, 58 S. Ct. 483, rehearing denied 303 U. S. 667, 82 L. Ed. 1124, 58 S. Ct. —.

²⁶ United Gas Public Service Co. v. Texas (1938) 303 U. S. 123, 82 L. Ed. 702, 58 S. Ct. 483, rehearing denied 303 U. S. 667, 82 L. Ed. 1124, 58 S. Ct. —.

²⁷ United Gas Public Service Co. v. Texas (1938) 303 U. S. 123, 82 L. Ed. 702, 58 S. Ct. 483, rehearing denied 303 U. S. 667, 82 L. Ed. 1124, 58 S. Ct. —.

much less to the framing of special issues as to particular isolated items, such as the separate value of component parts of the company's property for separate years. All these questions are within the state's power to provide for the conduct of jury trials.²⁸ Should the state so provide for the framing of special issues, there is nothing to suggest the invalidity of such a provision under the Constitution.

B. Other Review

§ 752. The Administrative Record.

Where no constitutional question is involved, trial in a suit for judicial review, so far as the question of validity of administrative action is concerned, resembles most the conduct of an appeal. It is essential that the administrative record be before the court; and if the administrative reports and order involved are not satisfactorily incorporated in the pleadings, the best practice is to offer these in evidence, and to offer a certified copy of the evidence in the administrative record, or so much of it as is relevant to the case. The transcript of the administrative record need not be printed in the absence of a court rule requiring that this be done,²⁹ and where judicial review is had in the Circuit Court of Appeals where printing is customary, the extent to which the administrative record must be printed will be dealt with separately in each case.³⁰ But where printing is required by court rule, it has been indicated that the entire record must be printed where lack of substantial evidence is asserted, unless the parties agree upon printing a portion only.³¹ However, the parties should be encouraged to stipulate the portions of the administrative record, usually very voluminous in its entirety, which bear on the question of presence of substantial evidence, rather than burden the court with a large record and the parties with excessive cost. Documents not made a part of the administrative record by the agency must be excluded.³² The findings of a trial examiner need not be included in the administrative record as a matter of right.³³

²⁸ *United Gas Public Service Co. v. Texas* (1938) 303 U. S. 123, 82 L. Ed. 702, 58 S. Ct. 483, rehearing denied 303 U. S. 667, 82 L. Ed. 1124, 58 S. Ct. —.

²⁹ See *Toledo Pipe-Threading Machine Co. v. Federal Trade Commission* (C. C. A. 6th, 1925) 6 F. (2d) 876.

³⁰ *Toledo Pipe-Threading Machine Co. v. Federal Trade Commission* (C.

C. A. 6th, 1925) 6 F. (2d) 876.

³¹ *Federal Trade Commission v. Inecto* (C. C. A. 2d, 1934) 70 F. (2d) 370.

³² *Powell v. Commissioner of Internal Revenue* (C. C. A. 1st, 1938) 94 F. (2d) 483; *Griffiths v. Commissioner of Internal Revenue* (C. C. A. 7th, 1931) 50 F. (2d) 782.

³³ *Raladam Co. v. Federal Trade Commission* (C. C. A. 6th, 1930) 42

Where it is claimed that the facts found are insufficient in law to sustain an order, the evidence taken before the agency need not be brought before the reviewing court.³⁴

§ 753. Habeas Corpus Proceedings.

The ordinary and proper practice on *habeas corpus* is to show by the return exactly what the administrative agency has done in the premises, submitting the agency's records with the return.³⁵ The court must thereupon ascertain what the agency has done, and declare whether in so doing it exceeded its jurisdiction. The practice of holding substantially the kind of hearing in court which ought to have been held by the agency is disapproved.³⁶

II. EVIDENCE

A. Presumptions and Prima Facie Evidence

§ 754. Introduction.

This subdivision concerns only presumptions indulged in suits for judicial review. Presumptions in administrative proceedings are treated elsewhere.³⁷

F. (2d) 430, aff'd 283 U. S. 643, 75 L. Ed. 1324, 51 S. Ct. 587, 79 A. L. R. 1191.

³⁴ "The Railroad Companies did not offer all of the evidence which was considered by the Commission; and on this appeal they do not include in the record all of the hundreds of pages of testimony which had been submitted to the Commission, but—conceding that the evidence was conflicting and tended to support the findings of the Commission—they insist that the facts found were insufficient in law to sustain the orders which were made. This most commendable practice not only saved the expense of printing many volumes of testimony, but saved the substantial points in the case from being submerged in a flood of testimony—much of which was explanatory before the Commission and most of which was wholly immaterial in an Appellate Court which cannot

reverse findings when supported by substantial—though conflicting—evidence. The practice is also in compliance with the spirit of the new Equity Rules (75, 76, 77) which call for just such a winnowing out of the useless; the presentation of only the relevant parts of exhibits, documents, tables, and reports; the elimination of all reduplications in written and oral testimony and a condensation into narrative form of what is material to the then issue before the court." (Mr. Justice Lamar in *Louisville & N. R. Co. v. United States* (1915) 238 U. S. 1, 10, 59 L. Ed. 1177, 35 S. Ct. 696.)

³⁵ *United States ex rel. Bieloszycka v. Commissioner of Immigration* (C. C. A. 2d, 1924) 3 F. (2d) 551.

³⁶ *United States ex rel. Bieloszycka v. Commissioner of Immigration* (C. C. A. 2d, 1924) 3 F. (2d) 551.

³⁷ See § 168.

§ 755. Presumption of Validity of Administrative Action.

There is a strong presumption in favor of the correctness of the conclusions reached by an experienced administrative agency after full hearing.³⁸ The principle of indulging this strong presumption applies *a fortiori* when the case is heard upon the record made before the administrative agency.³⁹ The presumption is not merely that the agency's conclusions are correct, but also that it acted fairly.⁴⁰ In the absence of clear evidence to the contrary, courts presume that public officers have properly discharged their duties.⁴¹ Tax assessments made by an agency are presumed to be valid assessments, and to have been rightly made on the basis of true value.⁴² There is a presumption that taxes paid are rightly collected upon assessments correctly made by the Commissioner of Internal Revenue.⁴³ But a determination

38 Administrator of Wage and Hour Division, Department of Labor.

Redlands Foothill Groves v. Jacobs (D. C. S. D. Cal., 1940) 30 F. Supp. 995.

Commissioner of Internal Revenue.

See Niles Bement Pond Co. v. United States (1930) 281 U. S. 357, 74 L. Ed. 901, 50 S. Ct. 251.

Federal Trade Commission.

Federal Trade Commission v. Baltimore Paint & Color Works (C. C. A. 4th, 1930) 41 F. (2d) 474.

Secretary of Agriculture.

St. Joseph Stock Yards Co. v. United States (1936) 298 U. S. 38, 80 L. Ed. 1033, 56 S. Ct. 720; American Commission Co. v. United States (D. C. D. Colo., 1935) 11 F. Supp. 965; Barker-Miller Distributing Co. v. Berman (D. C. W. D. N. Y., 1934) 8 F. Supp. 60.

State Agencies.

Great Northern Ry. Co. v. Weeks (1936) 297 U. S. 135, 80 L. Ed. 532, 56 S. Ct. 426; Pacific States Box & Basket Co. v. White (1935) 296 U. S. 176, 80 L. Ed. 138, 56 S. Ct. 159, 101 A. L. R. 853; Darnell v. Edwards (1917) 244 U. S. 564, 61 L. Ed. 1317, 37 S. Ct. 701; Des Moines Gas Co.

v. Des Moines (1915) 238 U. S. 153, 59 L. Ed. 1244, 35 S. Ct. 811; Railroad Commission v. Cumberland Telephone & Telegraph Co. (1909) 212 U. S. 414, 53 L. Ed. 577, 29 S. Ct. 357; Montana Power Co. v. Public Service Commission (D. C. D. Mont., 1935) 12 F. Supp. 946; Texport Carrier Corp. v. Smith (D. C. S. D. Tex., Austin Div., 1934) 8 F. Supp. 28.

39 St. Joseph Stock Yards Co. v. United States (1936) 298 U. S. 38, 80 L. Ed. 1033, 56 S. Ct. 720.

40 Des Moines Gas Co. v. Des Moines (1915) 238 U. S. 153, 59 L. Ed. 1244, 35 S. Ct. 811; Federal Trade Commission v. Baltimore Paint & Color Works (C. C. A. 4th, 1930) 41 F. (2d) 474; Montana Power Co. v. Public Service Commission (D. C. D. Mont., 1935) 12 F. Supp. 946.

41 Redlands Foothill Groves v. Jacobs (D. C. S. D. Cal., Cent. Div., 1940) 30 F. Supp. 995.

42 Great Northern Ry. Co. v. Weeks (1936) 297 U. S. 135, 80 L. Ed. 532, 56 S. Ct. 426.

43 Niles Bement Pond Co. v. United States (1930) 281 U. S. 357, 74 L. Ed. 901, 50 S. Ct. 251.

of the Commissioner is not conclusive. It only furnishes *prima facie* evidence of its correctness.⁴⁴

Where there was a question as to whether a complaint in an administrative proceeding had been filed within time, and the agency had acted as if it had been, in the absence of proof to the contrary it will be assumed that the agency would not have acted if it had lacked jurisdiction.⁴⁵

Where a state administrative agency acts in exercise of the state police power, the presumption of the existence of a state of facts sufficient to justify the exertion of the police power extends to action of the agency where its regulation is within the scope of authority legally delegated. The presumption of the existence of facts justifying its specific exercise attaches alike to statutes, to municipal ordinances, and to orders of administrative agencies.⁴⁶

Similarly, it is assumed that administrative officers are properly qualified.⁴⁷

It is also to be presumed that future administrative action will be valid and lawful rather than invalid and unlawful.⁴⁸ There is a presumption that state officers will not so construe or enforce an administrative order as to make its application unconstitutional.⁴⁹

⁴⁴ Wickwire v. Reinecke (1927) 275 U. S. 101, 72 L. Ed. 184, 48 S. Ct. 43.

⁴⁵ Barker-Miller Distributing Co. v. Berman (D. C. W. D. N. Y., 1934) 8 F. Supp. 60.

⁴⁶ Pacific States Box & Basket Co. v. White (1935) 296 U. S. 176, 80 L. Ed. 138, 56 S. Ct. 159, 101 A. L. R. 853.

⁴⁷ Farmers' Livestock Commission Co. v. United States (D. C. E. D. Ill., 1931) 54 F. (2d) 375.

⁴⁸ Interstate Commerce Commission.

Smith v. Interstate Commerce Commission (1917) 245 U. S. 33, 62 L. Ed. 135, 38 S. Ct. 30; New York Dock Ry. v. Pennsylvania R. Co. (D. C. E. D. Pa., 1932) 1 F. Supp. 20, aff'd (C. C. A. 3d, 1933) 62 F. (2d) 1010, cert. den. (1933) 289 U. S. 750, 77 L. Ed. 1495, 53 S. Ct. 694.

Federal Communications Commission.

Red River Broadcasting Co. v.

Federal Communications Commission (1938) 69 App. D. C. 3, 98 F. (2d) 282, cert. den. 305 U. S. 625, 83 L. Ed. 400, 59 S. Ct. 86.

State Agencies.

Clark's Ferry Bridge Co. v. Public Service Commission (1934) 291 U. S. 227, 78 L. Ed. 767, 54 S. Ct. 427; Michigan Cent. R. Co. v. Michigan Railroad Commission (1915) 236 U. S. 615, 59 L. Ed. 750, 35 S. Ct. 422; Henrietta Mills v. Rutherford County (C. C. A. 4th, 1929) 32 F. (2d) 570, aff'd (1930) 281 U. S. 121, 74 L. Ed. 737, 50 S. Ct. 270. See also Pacific Telephone & Telegraph Co. v. Seattle (1934) 291 U. S. 300, 78 L. Ed. 810, 54 S. Ct. 383.

⁴⁹ Michigan Cent. R. Co. v. Michigan Railroad Commission (1915) 236 U. S. 615, 59 L. Ed. 750, 35 S. Ct. 422.

Where a statute leaves a final definition to an administrative officer, who has not yet acted, that statute cannot be attacked under the Fourteenth Amendment as too vague. In this stage the party attacking can only show apprehension that the definition may be deficient. The Constitution cannot allay that fear.⁵⁰ The Supreme Court cannot presume that an investigation of the Interstate Commerce Commission will be instituted or conducted for any purpose other than one within the Commission's power, or in mere wanton meddling.⁵¹ Likewise there is a presumption that administrative officers will give effect to a court decision, and not act illegally.⁵² Thus it is fair to assume that tax officials will give effect to a court decision holding an assessment illegal. Hence the contention is not well founded that, where the assessment is quadrennial, the recovery of the illegally assessed tax in a lawsuit in the first year would still leave the assessment as the basis of illegal claims for the next three years.⁵³

Courts have no occasion to speculate on future administrative proceedings, and they will not assume that future administrative action will be arbitrary or otherwise unlawful.⁵⁴

§ 756. Finding Presumed to Be Supported by Evidence in Absence of Administrative Record.

Where it does not appear from the pleadings that an administrative finding is unsupported by substantial evidence, the finding is presumed to be supported by such evidence and is controlling in the reviewing court. In that event lack of substantial evidence may only be established upon examination of the administrative record.⁵⁵

⁵⁰ *Pacific Telephone & Telegraph Co. v. Seattle* (1934) 291 U. S. 300, 78 L. Ed. 810, 54 S. Ct. 383. But see § 8 et seq.

⁵¹ *Smith v. Interstate Commerce Commission* (1917) 245 U. S. 33, 62 L. Ed. 135, 38 S. Ct. 30.

⁵² *Henrietta Mills v. Rutherford County* (C. C. A. 4th, 1929) 32 F. (2d) 570, aff'd (1930) 281 U. S. 121, 74 L. Ed. 737, 50 S. Ct. 270.

⁵³ *Henrietta Mills v. Rutherford County* (C. C. A. 4th, 1929) 32 F. (2d) 570, aff'd (1930) 281 U. S. 121, 74 L. Ed. 737, 50 S. Ct. 270.

⁵⁴ See § 249 et seq.

⁵⁵ *Board of Tax Appeals.*

Winnett v. Helvering (C. C. A. 9th, 1934) 68 F. (2d) 614; *Tricou v. Hel-*

vering (C. C. A. 9th, 1933) 68 F. (2d) 280, cert. den. (1934) 292 U. S. 655, 78 L. Ed. 1503, 54 S. Ct. 865.

Court of Claims.

See *Milliken v. United States* (1931) 283 U. S. 15, 75 L. Ed. 809, 51 S. Ct. 324.

Interstate Commerce Commission.

Mississippi Valley Barge Line Co. v. United States (1934) 292 U. S. 282, 78 L. Ed. 1260, 54 S. Ct. 692.

Secretary of Agriculture.

Barker-Miller Distributing Co. v. Berman (D. C. W. D. N. Y., 1934) 8 F. Supp. 60.

State Agencies.

Banton v. Belt Line R. Corp. (1925) 268 U. S. 413, 69 L. Ed. 1020, 45 S. Ct. 534.

§ 757. Presumption of Validity of Corporate Acts.

Corporate books are presumed to be correct and reliable evidence,⁶⁰ and the good faith of the company's managers must be presumed.⁶¹ There is a presumption that a steamship company, in withdrawing all schedules of through rates for carriage to two shallow water ports did not intend to violate the statute by continuing through service to such ports without filing rates.⁶²

§ 758. Prima Facie Evidence.

The Valuation Act⁶³ provides that final valuations of railroad property, made by the Interstate Commerce Commission, which are not reviewable orders,⁶⁴ and "the classifications thereof," shall be *prima facie* evidence in controversies under the Act to Regulate Commerce.⁶⁵

Likewise, in a suit for damages under section 16 (2) of the Act⁶⁶ based upon a reparation order, the Commission's order is by statute made *prima facie* evidence of the "facts therein stated."

Proceedings under section 7 (b) of the Perishable Agricultural Commodities Act,⁶⁷ to enforce a liability determined by the Secretary of Agriculture under section 7 (a) of that Act, are not in the nature of an appeal from or a review of the Secretary's action. They are proceedings *de novo*, but, by virtue of the statute, the *prima facie* case made out by the findings and order of the Secretary will prevail unless overcome by evidence submitted by the defendant.⁶⁸

B. Burden of Proof

§ 759. Introduction.

This subdivision treats only matters of the burden of proof in suits for judicial review. Questions of burden of proof in administrative proceedings are treated elsewhere.⁶⁹

⁶⁰ West Ohio Gas Co. v. Public Utilities Commission (1935) 294 U. S. 63, 79 L. Ed. 761, 55 S. Ct. 316; Southwestern Bell Telephone Co. v. San Antonio (C. C. A. 5th, 1935) 75 F. (2d) 880, cert. den. 295 U. S. 754, 79 L. Ed. 1698, 55 S. Ct. 835.

⁶¹ West Ohio Gas Co. v. Public Utilities Commission (1935) 294 U. S. 63, 79 L. Ed. 761, 55 S. Ct. 316.

⁶² McCormick S. S. Co. v. United States (D. C., N. D. Cal., S. Div., 1936) 16 F. Supp. 45.

⁶³ 49 USCA 19a.

⁶⁴ United States v. Los Angeles & S. L. R. Co. (1927) 273 U. S. 299, 71 L. Ed. 651, 47 S. Ct. 413. See also § 195 et seq.

⁶⁵ 49 USCA 1 et seq.

⁶⁶ 49 USCA 16 (2)

⁶⁷ (1930) 46 Stat. 531 et seq., 7 USCA 499g.

⁶⁸ Barker-Miller Distributing Co. v. Berman (D. C. W. D. N. Y., 1934) 8 F. Supp. 60.

⁶⁹ See §§ 169, 302 et seq.

§ 760. On Constitutional Questions in General.

While trial of constitutional issues requires the court to arrive at its own independent judgment on the facts and the law,⁷⁰ the established principle which guides the court in the exercise of an independent judgment on the entire case is that the complaining party carries the burden of making a convincing showing.⁷¹ In deciding a constitutional issue a court will not interfere with any legislative power properly delegated to an administrative agency unless denial of a constitutional right is clearly established. The burden of proof upon a complainant asserting that he has been deprived of a constitutional right is perhaps heavier than usual where he relies upon evidence newly adduced in court but not in a proper sense newly discovered.⁷²

The burden is also upon the party claiming deprivation of a constitutional right to set forth in his complaint by direct allegations the facts on which he intends to maintain such a claim.⁷³

§ 761. — To Prove Confiscation.

The complainant alleging confiscation has the burden of proof. The court may not interfere with the exercise of the state's authority unless confiscation is clearly established,⁷⁴ with a high degree of certainty,⁷⁵ by clear and convincing proof,⁷⁶ even if he is the defendant

⁷⁰ See § 262 et seq.

⁷¹ *Thompson v. Consolidated Gas Utilities Corp.* (1937) 300 U. S. 55, 81 L. Ed. 510, 57 S. Ct. 364.

⁷² See § 747.

⁷³ See § 726 et seq.

⁷⁴ *Los Angeles Gas & Electric Corp. v. Railroad Commission* (1933) 289 U. S. 287, 77 L. Ed. 1180, 53 S. Ct. 637; *Allen v. St. Louis, I. M. & S. R. Co.* (1913) 230 U. S. 553, 57 L. Ed. 1625, 33 S. Ct. 1030; *The Minnesota Rate Cases* (1913) 230 U. S. 352, 57 L. Ed. 1511, 33 S. Ct. 729; *Railroad Commission v. Cumberland Telephone & Telegraph Co.* (1909) 212 U. S. 414, 53 L. Ed. 577, 29 S. Ct. 357; *Willecox v. Consolidated Gas Co.* (1909) 212 U. S. 19, 53 L. Ed. 382, 29 S. Ct. 192; *Knoxville v. Knoxville Water Co.* (1909) 212 U. S. 1, 53 L. Ed. 371, 29 S. Ct. 148.

⁷⁵ *Baltimore & O. R. Co. v. United*

States (1936) 298 U. S. 349, 80 L. Ed. 1209, 56 S. Ct. 797.

⁷⁶ *Interstate Commerce Commission.*

* *Manufacturers R. Co. v. United States* (1918) 246 U. S. 457, 62 L. Ed. 831, 38 S. Ct. 383.

Secretary of Agriculture.

St. Joseph Stock Yards Co. v. United States (1936) 298 U. S. 38, 80 L. Ed. 1033, 59 S. Ct. 720.

State Agencies.

American Toll Bridge Co. v. Railroad Commission (1939) 307 U. S. 486, 83 L. Ed. 1414, 59 S. Ct. 948; *United Gas Public Service Co. v. Texas* (1938) 303 U. S. 123, 82 L. Ed. 702, 58 S. Ct. 483, rehearing denied 303 U. S. 667, 82 L. Ed. 1124, 58 S. Ct. —; *West v. Chesapeake & Potomac Telephone Co.* (1935) 295 U. S. 662, 79 L. Ed. 1640, 55 S. Ct. 894; *Lindheimer v. Illinois Bell Telephone Co.* (1934) 292 U. S. 151, 78 L. Ed. 1182,

in a suit to enforce an administrative order.⁷⁷ The burden is on the one seeking relief to bring forward and to prove satisfactorily the invalidating facts.⁷⁸ As a practical matter, a very heavy burden is placed upon one who assails an administrative determination as confiscatory.⁷⁹ For instance, in a domain of knowledge still shifting and growing, and in a field where judgment is therefore necessarily beset by the necessity of inferences bordering on conjecture even for those learned in the art, it would be presumptuous for courts, on the basis of conflicting expert testimony, to deem the view of an administrative agency, acting under legislative authority, offensive to the Fourteenth Amendment. Confiscation is not established under such shadowy circumstances.⁸⁰ Such a burden of proof is sometimes specifically placed by statute upon parties claiming confiscation.⁸¹

A general rate set for all railroads in the state may be confiscatory as to some, but not all, of those attacking it jointly in one suit. Each must prove its own case.⁸²

The burden of proof on a party alleging confiscation is perhaps even heavier where an interlocutory injunction is sought.⁸³

Where a rate fixed in administrative proceedings is judicially assailed as confiscatory, the burden of proof upon the complainant to demonstrate its unreasonableness is heavier where the prescribed rate

54 S. Ct. 658; *Dayton Power & Light Co. v. Public Utilities Commission* (1934) 292 U. S. 290, 78 L. Ed. 1267, 54 S. Ct. 647; *United Fuel Gas Co. v. Railroad Commission* (1929) 278 U. S. 300, 73 L. Ed. 390, 49 S. Ct. 150; *Ex parte Lincoln Gas & Electric Light Co.* (1921) 256 U. S. 512, 65 L. Ed. 1066, 41 S. Ct. 558; *Knoxville v. Knoxville Water Co.* (1909) 212 U. S. 1, 53 L. Ed. 371, 29 S. Ct. 148; *Railroad Commission v. Cumberland Telephone & Telegraph Co.* (1909) 212 U. S. 414, 53 L. Ed. 577, 29 S. Ct. 357.

⁷⁷ *Lone Star Gas Co. v. Texas* (1938) 304 U. S. 224, 82 L. Ed. 1304, 58 S. Ct. 883, rehearing denied 304 U. S. 590, 82 L. Ed. 1549, 58 S. Ct. 1051.

⁷⁸ *Aetna Ins. Co. v. Hyde* (1928) 275 U. S. 440, 72 L. Ed. 357, 48 S. Ct. 174.

⁷⁹ See *United Gas Public Service Co. v. Texas* (1938) 303 U. S. 123, 82 L. Ed. 702, 58 S. Ct. 483, rehear-

ing denied 303 U. S. 667, 82 L. Ed. 1124, 58 S. Ct. —; *Des Moines Gas Co. v. Des Moines* (1915) 238 U. S. 153, 59 L. Ed. 1244, 35 S. Ct. 811; *Willeox v. Consolidated Gas Co.* (1909) 212 U. S. 19, 53 L. Ed. 382, 29 S. Ct. 192.

⁸⁰ *Railroad Commission of Texas v. Rowan & Nichols Oil Co.* (1940) 310 U. S. 573, 84 L. Ed. 1368, 60 S. Ct. 1021, opinion modified and rehearing denied 311 U. S. 614, 85 L. Ed. 390, 61 S. Ct. 66, rehearing again denied 311 U. S. 727, 85 L. Ed. 473, 61 S. Ct. 167; *s. c.* (1941) 311 U. S. 570, 85 L. Ed. 358, 61 S. Ct. 343.

⁸¹ *Texas, Revised Civil Statutes*, Article 6059.

⁸² *The Missouri Rate Cases* (1913) 230 U. S. 474, 57 L. Ed. 1571, 33 S. Ct. 975.

⁸³ *Georgia Railway & Power Co. v. Railroad Commission* (1923) 262 U. S. 625, 67 L. Ed. 1144, 43 S. Ct. 680.

has not been put in effect pending the judicial attack than where it has become effective, as the court is then deprived of evidence of results of an actual test of the prescribed rate.⁸⁴

Where a utility complains in a federal court of the constitutional invalidity of state-made rates, it is held to the burden of showing that invalidity by convincing proof, a slightly heavier burden, if anything, than the ordinary burden of showing confiscation.⁸⁵

The burden of proof is on a utility claiming confiscation to show that prices paid to an affiliate are not too high.⁸⁶

§ 762. — To Prove Arbitrary Action.

The burden of proof is on the party asserting it to show that assailed administrative action is arbitrary.⁸⁷ Thus the burden is upon the complaining party to overthrow the presumption of verity which attends an agency's findings and orders by a positive and clear showing that its action was arbitrary; that is, that it represents not the reasonable exercise of the agency's proper jurisdiction, but the unreasonable and arbitrary exertion of power in violation of the constitutional protection invoked.⁸⁸ The burden of proof is on the complaining party to show that the difficulty or expense involved in complying with an administrative order or part thereof lays so heavy a burden upon him as to overpass the bounds of reason and thus be arbitrary.⁸⁹ The burden of proving that the action of the Commissioner of Internal Revenue is plainly arbitrary is heavy.⁹⁰ The

⁸⁴ *United Gas Public Service Co. v. Texas* (1938) 303 U. S. 123, 82 L. Ed. 702, 58 S. Ct. 483, rehearing denied 303 U. S. 667, 82 L. Ed. 1124, 58 S. Ct. —.

⁸⁵ *Cf. Railroad Commission of California v. Pacific Gas & Electric Co.* (1938) 302 U. S. 388, 82 L. Ed. 319, 58 S. Ct. 334.

⁸⁶ *Dayton Power & Light Co. v. Public Utilities Commission* (1934) 292 U. S. 290, 78 L. Ed. 1267, 54 S. Ct. 647.

⁸⁷ *Commissioner of Internal Revenue.*

Lucas v. Kansas City Structural Steel Co. (1930) 281 U. S. 264, 74 L. Ed. 848, 50 S. Ct. 263; *Niles Bement Pond Co. v. United States* (1930) 281 U. S. 357, 74 L. Ed. 901, 50 S. Ct.

251; *Wickwire v. Reinecke* (1927) 275 U. S. 101, 72 L. Ed. 184, 48 S. Ct. 43.

Federal Communications Commission.

American Telephone & Telegraph Co. v. United States (1936) 299 U. S. 232, 81 L. Ed. 142, 57 S. Ct. 170.

State Agencies.

Texport Carrier Corp. v. Smith (D. C. S. D. Tex., Austin Div., 1934) 8 F. Supp. 28.

⁸⁸ *Texport Carrier Corp. v. Smith* (D. C. S. D. Tex., Austin Div., 1934) 8 F. Supp. 28.

⁸⁹ *American Telephone & Telegraph Co. v. United States* (1936) 299 U. S. 232, 81 L. Ed. 142, 57 S. Ct. 170.

⁹⁰ *Lucas v. Kansas City Structural Steel Co.* (1930) 281 U. S. 264, 74 L. Ed. 848, 50 S. Ct. 263.

burden is on the taxpayer to prove all facts necessary to establish illegality of collection.⁹¹

§ 763. — Burden of Proof Similar to That Placed on Party Alleging Unconstitutionality of Statute.

The rule above stated applicable to constitutional questions raised in administrative law cases is stronger than the ordinary rule in civil cases requiring a plaintiff to establish his case by a preponderance of the evidence. It is the substantial equivalent of the burden placed upon a party who assails a statute as confiscatory or otherwise unconstitutional, although in such a case there is no administrative law question and direct legislative action is assailed free from administrative complications.

§ 764. To Show Finding Unsupported by Evidence.

The burden of showing that a finding is unsupported by substantial evidence is upon the party making that claim.⁹²

C. Judicial Notice

§ 765. In General.

Courts take judicial notice of matters of common knowledge in cases involving judicial review as in other civil cases.⁹³ When courts take judicial notice it has no other effect than to relieve a party to a controversy of the burden of resorting to the usual forms of evidence. It does not mean that an opponent is prevented from disputing the matter by evidence if he believes it disputable. This is the general rule and will be adhered to in the absence of exceptional conditions.⁹⁴ The category of the subjects of judicial notice is never closed. Any

⁹¹ *Niles Bement Pond Co. v. United States* (1930) 281 U. S. 357, 74 L. Ed. 901, 50 S. Ct. 251; *Wickwire v. Reinecke* (1927) 275 U. S. 101, 72 L. Ed. 184, 48 S. Ct. 43.

⁹² *Banton v. Belt Line R. Co.* (1925) 268 U. S. 413, 69 L. Ed. 1020, 45 S. Ct. 534; *National Labor Relations Board v. Brown Paper Mill Co.* (C. C. A. 5th, 1940) 108 F. (2d) 867; *Oilwell Express Corp. v. Railroad Commission of California* (D. C. S. D. Cal., Cent.

Div., 1935) 11 F. Supp. 665. See § 575 et seq.

⁹³ *McCart v. Indianapolis Water Co.* (1938) 302 U. S. 419, 82 L. Ed. 336, 58 S. Ct. 324; *Ohio Bell Telephone Co. v. Public Utilities Commission* (1937) 301 U. S. 292, 81 L. Ed. 1039, 57 S. Ct. 724.

⁹⁴ *Ohio Bell Telephone Co. v. Public Utilities Commission* (1937) 301 U. S. 292, 81 L. Ed. 1093, 57 S. Ct. 724.

new fact may be judicially noticed so long as the new fact is notorious to the community.⁹⁵

Judicial notice must be taken during trial. The doctrine may not be applied retroactively after the case has been submitted. Such a practice would turn the doctrine into a pretext for dispensing with a trial.⁹⁶ In such event, the subject of judicial notice would not be disclosed to the parties to the controversy so as to give opportunity for rebuttal or become the subject of argument. Such a practice would fail to furnish opportunity to know and meet opposing claims.⁹⁷ The subject of judicial notice in administrative proceedings is governed by the same principles.⁹⁸

§ 766. Subjects of Judicial Notice.

Judicial notice may be taken of general business conditions,⁹⁹ of an upward trend in prices,¹ and the level of prices,² that there has been a depression and that a decline of market values is one of its concomitants,³ or that there has been no substantial general decline.⁴ Likewise judicial notice may be taken of the fact that there has been a recovery and rise in values.⁵ Such notice may be the basis of reversing the decree of a lower court which refused to enjoin rates as

⁹⁵ *Ohio Bell Telephone Co. v. Public Utilities Commission* (1937) 301 U. S. 292, 81 L. Ed. 1093, 57 S. Ct. 724.

⁹⁶ *Ohio Bell Telephone Co. v. Public Utilities Commission* (1937) 301 U. S. 292, 81 L. Ed. 1093, 57 S. Ct. 724.

⁹⁷ See § 290 et seq.

⁹⁸ See § 290 et seq.

⁹⁹ *Dayton Power & Light Co. v. Public Utilities Commission* (1934) 292 U. S. 290, 78 L. Ed. 1267, 54 S. Ct. 647.

¹ *McCart v. Indianapolis Water Co.* (1938) 302 U. S. 419, 82 L. Ed. 336, 58 S. Ct. 324.

² *Los Angeles Gas & Electric Corp. v. Railroad Commission* (1933) 289 U. S. 287, 77 L. Ed. 1180, 53 S. Ct. 637.

³ *Interstate Commerce Commission.*

Atchison, T. & S. F. R. Co. v. United States (1932) 284 U. S. 248, 76 L. Ed. 273, 52 S. Ct. 146.

State Agencies.

Ohio Bell Telephone Co. v. Public

Utilities Commission (1937) 301 U. S. 292, 81 L. Ed. 1093, 57 S. Ct. 724; *Dayton Power & Light Co. v. Public Utilities Commission* (1934) 292 U. S. 290, 78 L. Ed. 1267, 54 S. Ct. 647; *Central Kentucky Natural Gas Co. v. Railroad Commission* (1933) 290 U. S. 264, 78 L. Ed. 307, 54 S. Ct. 154; *Lindheimer v. Illinois Bell Telephone Co.* (1933) 292 U. S. 151, 78 L. Ed. 1182, 54 S. Ct. 658; *Los Angeles Gas & Electric Corp. v. Railroad Commission* (1933) 289 U. S. 287, 77 L. Ed. 1180, 53 S. Ct. 637.

⁴ *Los Angeles Gas & Electric Corp. v. Railroad Commission* (1933) 289 U. S. 287, 77 L. Ed. 1180, 53 S. Ct. 637.

⁵ *McCardle v. Indianapolis Water Co.* (1926) 272 U. S. 400, 71 L. Ed. 316, 47 S. Ct. 414; *Banton v. Belt Line R. Co.* (1925) 268 U. S. 413, 69 L. Ed. 1020, 45 S. Ct. 534; *Ex parte Lincoln Gas & Electric Light Co. v. Lincoln* (1919) 250 U. S. 256, 63 L. Ed. 968, 39 S. Ct. 454.

confiscatory, because changes in economic conditions may make them so.⁶

The extent of the decline in market value of any particular industry, material or other tangible or intangible object at a given time and place, is not a matter of judicial notice.⁷ The distinction between the fact of a decline, of which judicial notice may be taken, and the degree of the decline, of which judicial notice may not be taken, is the more important in cases where the extent of the fluctuations is not collaterally involved but is the very point in issue.⁸

Intercorporate relations involving the payment to an affiliated corporation of charges in excess of just and reasonable charges, are today matters of common knowledge of which judicial notice may be taken.⁹

Judicial notice has been taken of facts of record in a former rate case involving the same utility.¹⁰

Judicial notice may be taken of the fact that a commercial product is in competition with other commercial products.¹¹

Judicial notice will be taken of the personnel of administrative agencies,¹² their rules of procedure,¹³ their location, for purposes of asserting jurisdiction over them,¹⁴ the fact that defendants are governmental officials, and the nature and scope of their official duties.¹⁵

D. Expert Testimony

§ 767. In General.

Expert testimony is common in rate cases, and has often proven to be of great value. However, the weight to be accorded to the testi-

⁶ *McCart v. Indianapolis Water Co.* (1938) 302 U. S. 419, 82 L. Ed. 336, 58 S. Ct. 324.

⁷ *Ohio Bell Telephone Co. v. Public Utilities Commission* (1937) 301 U. S. 292, 81 L. Ed. 1039, 57 S. Ct. 724.

⁸ *Ohio Bell Telephone Co. v. Public Utilities Commission* (1937) 301 U. S. 292, 81 L. Ed. 1039, 57 S. Ct. 724.

⁹ *American Telephone & Telegraph Co. v. United States* (1936) 299 U. S. 232, 81 L. Ed. 142, 57 S. Ct. 170.

¹⁰ *West Ohio Gas Co. v. Public Utilities Commission* (1935) 294 U. S. 63, 79 L. Ed. 761, 55 S. Ct. 316. See Black, J., dissenting in *McCart v. Indianapolis Water Co.* (1938) 302 U. S. 419, 82 L. Ed. 336, 58 S. Ct. 324.

¹¹ *West Ohio Gas Co. v. Public*

Utilities Commission (1935) 294 U. S. 63, 79 L. Ed. 761, 55 S. Ct. 316.

¹² *Frischer & Co. v. Bakelite Corp.* (Ct. Cust. & Pat. App., 1930) 39 F. (2d) 247, cert. den. 282 U. S. 852, 75 L. Ed. 755, 51 S. Ct. 29.

¹³ *Lewis-Hall Iron Works v. Blair* (1928) 57 App. D. C. 364, 23 F. (2d) 972, cert. den. 277 U. S. 592, 72 L. Ed. 1004, 48 S. Ct. 592.

¹⁴ *International Molders Union v. National Labor Relations Board* (D. C. E. D. Pa., 1939) 26 F. Supp. 423.

¹⁵ *Cooper v. O'Connor* (1938) 69 App. D. C. 100, 99 F. (2d) 135, 118 A. L. R. 1440, cert. den. 305 U. S. 643, 83 L. Ed. 414, 59 S. Ct. 146, rehearing denied 307 U. S. 651, 83 L. Ed. 1529, 59 S. Ct. 1035.

mony of experts cannot be determined without understanding their approach to the question and the criteria which govern their estimates.¹⁶ Where experts proceed even in part upon an erroneous basis their testimony does not have the convincing character required in confiscation cases.¹⁷ When an opinion of an expert lacks disclosed, definite bases of established fact, no weight whatever may be given to the opinion.¹⁸ And in any event the opinions of experts unsupported by adequate actual tests may not safely be substituted for concrete data.¹⁹

An objection that a depreciation figure used by a government engineer was based on an average of percentages given by his assistants, none of whom testified, is not available to a stockyard's company which did not avail itself of opportunity to produce and cross-examine the assistants.²⁰

Opinion evidence or estimates, are competent to show depletion by estimating the future yield of a company's property.²¹

§ 768. Expert Must Be Properly Qualified.

In accordance with accepted principles of proof, an expert must be properly qualified before his testimony as an expert may be given, and it has been indicated that otherwise so-called expert testimony is not substantial evidence upon which an administrative finding may be based.²²

§ 769. Estimates.

Estimates which are concretely based in actuality have probative value, constituting competent proof which may be the basis of a determination as to value or any other appropriate subject of expert testimony. But there is no principle of due process which requires a rate-making agency to base its decision as to value, or anything else, upon

¹⁶ *St. Joseph Stock Yards Co. v. United States* (1936) 298 U. S. 38, 80 L. Ed. 1033, 56 S. Ct. 720.

¹⁷ *St. Joseph Stock Yards Co. v. United States* (1936) 298 U. S. 38, 80 L. Ed. 1033, 56 S. Ct. 720.

¹⁸ *Baltimore & O. R. Co. v. United States* (1936) 298 U. S. 349, 80 L. Ed. 1209, 56 S. Ct. 797.

¹⁹ *Baltimore & O. R. Co. v. United States* (1936) 298 U. S. 349, 80 L. Ed.

1209, 56 S. Ct. 797; * *The Missouri Rate Cases* (1913) 230 U. S. 474, 57 L. Ed. 1571, 33 S. Ct. 975.

²⁰ *St. Joseph Stock Yards Co. v. United States* (1936) 298 U. S. 38, 80 L. Ed. 1033, 56 S. Ct. 720.

²¹ See § 367.

²² See *Denver Union Stock Yards Co. v. United States* (1938) 304 U. S. 470, 82 L. Ed. 1469, 58 S. Ct. 990.

conjectural estimates.^a Such estimates have been frequently rejected by the Supreme Court as incompetent proof,^b and the Supreme Court has emphasized the danger of resting conclusions upon estimates of a conjectural character.^c Thus figures for "cost of financing" and "promoters' remuneration" have been properly excluded, as evidence of reproduction cost where they were too hypothetical and far removed from actuality.^d

§ 770. — Basis of an Estimate May Be Investigated.

The basis upon which an estimate is made may always be looked into,²³ and an estimate based materially, even in part, upon an erroneous principle or fact is incompetent evidence to the extent that the erroneous basis pervades the estimate.²⁴ Thus, when estimates have been based on a ten-year level of prices, the court will consider whether an adequately typical ten-year period was selected,²⁵ and whether prices can be expected to behave in accordance with predictions based on that period.²⁶

§ 771. — Going Concern Value.

Going concern value is itself an estimate, and may be based on estimates.²⁷ But expert testimony which follows an elaborate method involving assumptions and speculations of the sort which fail to furnish a sound basis for computing a separate allowance for going concern value, have no probative effect.²⁸ Evidence questions concerning estimates said to show going concern value are treated elsewhere.²⁹

^a Railroad Commission of California v. Pacific Gas & Electric Co. (1938) 302 U. S. 388, 82 L. Ed. 319, 58 S. Ct. 334.

^b Railroad Commission of California v. Pacific Gas & Electric Co. (1938) 302 U. S. 388, 82 L. Ed. 319, 58 S. Ct. 334; Manufacturers R. Co. v. United States (1918) 246 U. S. 457, 62 L. Ed. 831, 38 S. Ct. 383.

^c Railroad Commission of California v. Pacific Gas & Electric Co. (1938) 302 U. S. 388, 82 L. Ed. 319, 58 S. Ct. 334; United Fuel Gas Co. v. Railroad Commission (1929) 278 U. S. 300, 73 L. Ed. 390, 49 S. Ct. 150.

^d Los Angeles Gas & Electric Corp.

v. Railroad Commission (1933) 289 U. S. 287, 77 L. Ed. 1180, 53 S. Ct. 637.

²³ McCardle v. Indianapolis Water Co. (1926) 272 U. S. 400, 71 L. Ed. 316, 47 S. Ct. 144.

²⁴ See § 767.

²⁵ McCardle v. Indianapolis Water Co. (1926) 272 U. S. 400, 71 L. Ed. 316, 47 S. Ct. 144.

²⁶ McCardle v. Indianapolis Water Co. (1926) 272 U. S. 400, 71 L. Ed. 316, 47 S. Ct. 144.

²⁷ See § 361 et seq.

²⁸ St. Joseph Stock Yards Co. v. United States (1936) 298 U. S. 38, 80 L. Ed. 1033, 56 S. Ct. 720.

²⁹ See § 361 et seq.

*E. Evidence Introduced by Stipulation***§ 772. In General.**

Effect is given to stipulations of counsel in suits for judicial review as in other litigation. It is not uncommon for the parties to stipulate that reference may be made to evidence in various other proceedings before an administrative agency and in suits in the courts.³⁰ Evidence introduced in a separate suit may be introduced by stipulation for certain specified purposes, and will be considered for those purposes only.³¹ This rule applies even though the separate suit was in the federal courts while the suit in which the stipulation was introduced was in a state court.³²

The contents, in whole or in part, of the evidence in the administrative record, may be stipulated upon judicial review.³³ This is a highly desirable practice. It makes possible the omission of portions of an administrative record which may run to thousands of pages and involve a considerable cost of reproduction.

*F. Particular Subjects of Proof***§ 773. Lack of Substantial Evidence.**

A court will not consider the claim that a finding is not supported by substantial evidence in the absence of the record of evidence adduced in the administrative proceeding.³⁴ In the absence of the administrative record, proffered new evidence may well have been rebutted by evidence adduced before the agency.³⁵

Where it is objected that essential findings are lacking, and also that essential findings made are not supported by evidence, and all the evidence before the agency was introduced below and in substance incorporated into the record on appeal, the Supreme Court must consider both classes of objections.³⁶ Evidence outside the administrative record is inadmissible for the purpose of showing that a finding

³⁰ *Atlanta, B. & C. R. Co. v. United States* (1935) 296 U. S. 33, 80 L. Ed. 25, 56 S. Ct. 12.

³¹ *Ohio Bell Telephone Co. v. Public Utilities Commission* (1937) 301 U. S. 292, 81 L. Ed. 1093, 57 S. Ct. 724.

³² *Ohio Bell Telephone Co. v. Public Utilities Commission* (1937) 301 U. S. 292, 81 L. Ed. 1093, 57 S. Ct. 724.

³³ *Mahler v. Eby* (1924) 264 U. S. 32, 68 L. Ed. 549, 44 S. Ct. 283.

³⁴ See §§ 577, 756.

³⁵ *Mississippi Valley Barge Line Co. v. United States* (1934) 292 U. S. 282, 78 L. Ed. 1260, 54 S. Ct. 692.

³⁶ *Colorado v. United States* (1926) 271 U. S. 153, 70 L. Ed. 878, 46 S. Ct. 452.

is not supported by substantial evidence.³⁷ Thus affidavits tending to show that the administrative order will ruin a party's business are inadmissible.³⁸

This rule does not apply upon trial *de novo* of a constitutional question, to which the doctrine of administrative finality does not apply.³⁹ For instance, taxing officials may testify as to the systematic and intentional undervaluation of property other than the complainant's.⁴⁰

§ 774. Intended Course of Administrative Action.

The nature of an intended course of administrative action must be proven like any other fact. No court will assume that it will be arbitrary or otherwise unconstitutional or unlawful.⁴¹ A threat as to an intended course of administrative action is competent evidence to prove its nature.⁴²

§ 775. Agency's Course of Reasoning.

The best evidence of the course of deliberation pursued by an administrative agency in making a decision is a statement in the agency's opinion or report as to the course pursued.⁴³ Where the agency's opinion or report shows the course of deliberation pursued, affidavits of an officer of a party or of the president, chairman, or member of the agency are of slight value.⁴⁴

§ 776. Value.

In a suit to enjoin the enforcement of a rate-order as confiscatory, the values returned by the utility for taxation are properly received

³⁷ National Labor Relations Board v. Newport News Shipbuilding & Dry Dock Co. (1939) 308 U. S. 241, 84 L. Ed. 219, 60 S. Ct. 203; Mississippi Valley Barge Line Co. v. United States (1934) 292 U. S. 282, 78 L. Ed. 1260, 54 S. Ct. 692; Southern Ry. Co. v. Eichler (C. C. A. 8th, 1932) 56 F. (2d) 1010.

³⁸ Mississippi Valley Barge Line Co. v. United States (1934) 292 U. S. 282, 78 L. Ed. 1260, 54 S. Ct. 692.

³⁹ See § 262 et seq.

⁴⁰ Bohler v. Callaway (1925) 267 U. S. 479, 69 L. Ed. 745, 45 S. Ct. 431.

See § 401 et seq.

⁴¹ Natural Gas Pipeline Co. v. Slattery (1937) 302 U. S. 300, 82 L. Ed. 276, 58 S. Ct. 199. See also § 755.

⁴² Natural Gas Pipeline Co. v. Slattery (1937) 302 U. S. 300, 82 L. Ed. 276, 58 S. Ct. 199.

⁴³ Railroad Commission of California v. Pacific Gas & Electric Co. (1938) 302 U. S. 388, 82 L. Ed. 319, 58 S. Ct. 334.

⁴⁴ Railroad Commission of California v. Pacific Gas & Electric Co. (1938) 302 U. S. 388, 82 L. Ed. 319, 58 S. Ct. 334.

in evidence as admissions against interest.⁴⁵ An inventory made by the utility is admissible as evidence of present fair value in a rate-fixing proceeding.⁴⁶ Assessed valuation has been held to be evidence to be considered, but is not controlling,⁴⁷ and indeed cannot be regarded as sufficient evidence of valuation where the principles governing the assessment are not properly shown.⁴⁸

A finding of value as of a particular date by a district court in a confiscation case must have a basis in evidence justifying the finding as of that date.⁴⁹ This is especially necessary where reduced rates based upon that valuation and assailed as confiscatory have not been enjoined but are continued in effect.⁵⁰

Reproduction cost may be proved either by evidence of actual experience in the construction and development of the property in question or of comparable property, or by estimates. The former is the more satisfactory form of proof.⁵¹

The purchase price of the property in question does not necessarily fix the fair value of such property, but is evidence to be considered in determining such fair value.⁵²

§ 777. Confiscation.

Evidence that rates established voluntarily by a utility were substantially the same as those attacked as confiscatory is relevant evidence tending to show lack of confiscation.⁵³ Evidence of failure by a utility to contest the validity of certain rates or divisions is not relevant evidence tending to show that those rates or divisions are not confiscatory.⁵⁴ Evidence which shows confiscation does not lose its force because it also tends to show that rates or divisions which have been accepted by the utility over a substantial period, were also con-

⁴⁵ Great Falls Gas Co. v. Public Service Commission (D. C. D. Mont., 1929) 34 F. (2d) 297.

⁴⁶ Board of Public Utility Com'rs v. Elizabethtown Water Co. (C. C. A. 3d, 1930) 43 F. (2d) 478.

⁴⁷ Greencastle Water Works Co. v. Public Service Commission (D. C. S. D. Ind., 1929) 31 F. (2d) 600.

⁴⁸ The Missouri Rate Cases (1913) 230 U. S. 474, 57 L. Ed. 1571, 33 S. Ct. 975.

⁴⁹ McCart v. Indianapolis Water Co. (1938) 302 U. S. 419, 82 L. Ed. 336, 58 S. Ct. 324.

⁵⁰ McCart v. Indianapolis Water Co. (1938) 302 U. S. 419, 82 L. Ed. 336, 58 S. Ct. 324.

⁵¹ See §§ 354-360.

⁵² Greencastle Water Works Co. v. Public Service Commission (D. C. S. D. Ind., 1929) 31 F. (2d) 600.

⁵³ Manufacturers R. Co. v. United States (1918) 246 U. S. 457, 62 L. Ed. 831, 38 S. Ct. 383.

⁵⁴ Baltimore & O. R. Co. v. United States (1936) 298 U. S. 349, 80 L. Ed. 1209, 56 S. Ct. 797.

fiscatory. Utilities may accept rates and divisions which are lower than they can be compelled by law to accept.⁵⁵

§ 778. — Results of Test Period for Rates Assailed.

A trial court may consider, in refusing to enjoin prescribed lower rates assailed as confiscatory, that a supervening test period will prove or disprove the allegations of confiscation.⁵⁶ Evidence of actual experience with prescribed rates may be of great force, but is of little value where the test period is brief⁵⁷ or where conditions during the period are abnormal.⁵⁸ The failure of a utility to introduce evidence of the results for representative periods subsequent to the taking effect of the administrative order and near to the time of the trial *de novo*, strongly suggests that the figures on which the utility's estimates or calculations are based could not be supported, and leaves in grave doubt the validity of its proof.⁵⁹ Confiscation is not established where the evidence shows the rates assailed to be so nearly adequate that only a practical test can vitalize a doubt as to their sufficiency.⁶⁰

§ 779. — Rate of Return.

Evidence that a utility paid an interest rate on its necessary borrowings, which was higher than the rate of return fixed for use of its property, is competent evidence to show that the rate of return was too low, since (1) it demonstrates the utility's poor financial position, and (2) a business requiring skill should return more than a mere investment rate.⁶¹ And evidence that a prevailing interest rate is as high as an estimated rate of return is competent evidence tending to show that the rate of return is confiscatory.⁶²

⁵⁵ Baltimore & O. R. Co. v. United States (1936) 298 U. S. 349, 80 L. Ed. 1209, 56 S. Ct. 797.

⁵⁶ Brush Elec. Co. v. Galveston (1923) 262 U. S. 443, 67 L. Ed. 1076, 43 S. Ct. 606. See Darnell v. Edwards (1917) 244 U. S. 564, 61 L. Ed. 1317, 37 S. Ct. 701.

⁵⁷ Darnell v. Edwards (1917) 244 U. S. 564, 61 L. Ed. 1317, 37 S. Ct. 701.

⁵⁸ Darnell v. Edwards (1917) 244 U. S. 564, 61 L. Ed. 1317, 37 S. Ct. 701; Allen v. St. Louis, I. M. & S. R. Co. (1913) 230 U. S. 553, 57 L. Ed. 1625, 33 S. Ct. 1030; Knoxville v. Knox-

ville Water Co. (1909) 212 U. S. 1, 53 L. Ed. 371, 29 S. Ct. 143.

⁵⁹ Baltimore & O. R. Co. v. United States (1936) 298 U. S. 349, 80 L. Ed. 1209, 56 S. Ct. 797.

⁶⁰ Willeox v. Consolidated Gas Co. (1909) 212 U. S. 19, 53 L. Ed. 382, 29 S. Ct. 192.

⁶¹ United Railways & Electric Co. v. West (1930) 280 U. S. 234, 74 L. Ed. 390, 50 S. Ct. 173.

⁶² McCordle v Indianapolis Water Co. (1926) 272 U. S. 400, 71 L. Ed. 316, 47 S. Ct. 144.

§ 780. Cost of Transportation of Commodity.

Precision is impossible in seeking to ascertain the cost of one out of many commodities transported. Such cost of transportation need not be proven with arithmetical accuracy. It is enough, if the evidence preponderating in favor of a particular cost figure reasonably warrants findings sufficient to support the decree sought.⁶³

⁶³ *Baltimore & O. R. Co. v. United States* (1936) 298 U. S. 349, 80 L. Ed. 1209, 56 S. Ct. 797.

CHAPTER 45

DISPOSITION OF CASE

I. IN GENERAL

- § 781. Judicial Power Limited by the Constitution.
- § 782. Dismissal of Bill Without Prejudice.
- § 783. Temporary Stay of Enforcement.

II. FINDINGS

- § 784. Findings of Fact and Conclusions of Law Required in All Cases of Judicial Review in Equity.

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- § 788. Remand Essential for Completion of Legislative Process.
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- § 793. Court May Require Further Administrative Action Within Reasonable Time.
- § 794. Constitutional and Statutory Provisions.

V. COSTS

- § 795. In General.

I. IN GENERAL

§ 781. Judicial Power Limited by the Constitution.

A suit involving judicial review is, in the last analysis, essentially a case or controversy appropriate for the exercise of the judicial power under the Constitution, and nothing more or less.¹ Thus the court's power of disposition of the case is limited by the constitutional limitations upon the judicial power. The fact that the judicial power is invoked respecting the validity of administrative action within the legislative sphere does in no sense enlarge its scope. It is exhausted when the questions of law are settled. The orthodox relief granted is

¹ See § 41 et seq.

the entry of a decree dismissing the bill, or one suspending, enjoining, setting aside, or annulling an administrative order. Generally speaking, this marks the limit of the judicial power. Under the doctrine of the separation of powers a court may not decide administrative questions since they are within the legislative sphere. The judicial function respecting administrative questions is limited to deciding whether an administrative determination of such a question is valid on questions of law.²

Administrative agencies wield the enormous practical weapon of being able to make an initial decision on certain judicial questions although such initial decisions are not binding and this is only a procedural factor of the administrative process.³ Where the controversy involves only questions of law, uncomplicated by further administrative considerations, there is no hindrance to a full disposition of the controversy in an affirmative sense by the court. Perhaps the best illustration of such disposition is the granting of a mandamus order or injunction commanding a specific course of administrative conduct.⁴

§ 782. Dismissal of Bill Without Prejudice.

Where the evidence is insufficient to meet the burden of proving confiscation but there is a possibility that after a full and fair test rates attacked may be clearly shown to be confiscatory, a complaint charging confiscation should be dismissed without prejudice.⁵ However, dismissal without prejudice is more a matter of form than substance, inasmuch as in confiscation cases the issue of confiscation is not a static issue, but exists as of the very day of the judicial trial *de novo*. Hence even a dismissal with prejudice cannot operate as *res judicata* except as of a particular time. A variation of this is found in *Smyth v. Ames*⁶ where the final decree, affirming an injunction against the enforcement of rates declared confiscatory included a provision that the injunction be dissolved if it were shown that changing business conditions had caused the rate to become compensatory.

² See § 505 et seq.

³ See §§ 41, 73, 425 et seq.

⁴ See §§ 688, 704.

⁵ *Darnell v. Edwards* (1917) 244 U. S. 564, 61 L. Ed. 1317, 37 S. Ct. 701;

* *Des Moines Gas Co. v. Des Moines* (1915) 238 U. S. 153, 59 L. Ed. 1244, 35 S. Ct. 811; *Northern Pac. R. Co.*

v. North Dakota ex rel. McCue (1910)

216 U. S. 579, 54 L. Ed. 624, 30 S. Ct.

423; *Knoxville v. Knoxville Water Co.* (1909) 212 U. S. 1, 53 L. Ed. 371, 29 S. Ct. 148; *Willeox v. Consolidated Gas Co.* (1909) 212 U. S. 19, 53 L. Ed. 382, 29 S. Ct. 192.

⁶ (1898) 169 U. S. 466, 42 L. Ed. 819, 18 S. Ct. 418.

§ 783. Temporary Stay of Enforcement.

The court, while affirming and enforcing an administrative order, may withhold enforcement for a period to permit either party to apply for leave to adduce additional evidence before the agency for the purpose of determining details of enforcement.⁷

II. FINDINGS

§ 784. Findings of Fact and Conclusions of Law Required in All Cases of Judicial Review in Equity.

Findings of fact and conclusions of law must be made by a court upon judicial review of administrative action. This is an essential aid to the appellate court in reviewing an equity case.⁸ The general rule requiring findings of fact and conclusions of law in equity cases which developed under former Equity Rule 70½,⁹ is continued by

⁷National Labor Relations Board v. Carlisle Lumber Co. (C. C. A. 9th, 1937) 94 F. (2d) 138.

⁸Mayo v. Lakeland Highlands Canning Co. (1940) 309 U. S. 310, 84 L. Ed. 774, 60 S. Ct. 517; Interstate Circuit v. United States (1938) 304 U. S. 55, 82 L. Ed. 1146, 58 S. Ct. 768; Railroad Commission v. Maxey (1930) 281 U. S. 82, 74 L. Ed. 717, 50 S. Ct. 228.

⁹"Equity Rule 70-½ provides:

"In deciding suits in equity, including those required to be heard before three judges, the court of first instance shall find the facts specially and state separately its conclusions of law thereon; . . .

"Such findings and conclusions shall be entered of record and, if an appeal is taken from the decree, shall be included by the clerk in the record which is certified to the appellate court under rules 75 and 76."

"The District Court did not comply with this rule. The court made no formal findings. The court did not find the facts specially and state separately its conclusions of law as the

rule required. The statements in the decree that in making the restrictive agreements the parties had engaged in an illegal conspiracy were but ultimate conclusions and did not dispense with the necessity of properly formulating the underlying findings of fact.

"The opinion of the court was not a substitute for the required findings. A discussion of portions of the evidence and the court's reasoning in its opinion do not constitute the special and formal findings by which it is the duty of the court appropriately and specifically to determine all the issues which the case presents. This is an essential aid to the appellate court in reviewing an equity case (Railroad Commission v. Maxey, 281 U. S. 82, and cases cited) and compliance with the rule is particularly important in an anti-trust case which comes to this Court by direct appeal from the trial court." (Per Curiam in Interstate Circuit v. United States (1938) 304 U. S. 55, 56, 57, 82 L. Ed. 1146, 58 S. Ct. 768.)

Rule 52 of the Federal Rules of Civil Procedure,¹⁰ and applies to cases under the Urgent Deficiencies Act. The special importance of such cases makes such an aid to the reviewing court also important.¹¹ Where the trial court fails to state the grounds of its decision, the appellate court is denied an important aid in the consideration of the case; and the defeated party is often unable to determine whether the case presents a question worthy of consideration by the appellate court. Thus both the litigants and the court are subjected to unnecessary labor.¹²

¹⁰ Rule 52 of the Federal Rules of Civil Procedure:

"Rule 52. Findings by the Court

"(a) Effect. In all actions tried upon the facts without a jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court.

"(b) Amendment. Upon motion of a party made not later than 10 days after entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly. The motion may be made with a motion for a new trial pursuant to Rule 59. When findings of fact are made in actions tried by the court without a jury, the question of the sufficiency of the evidence to support the findings may thereafter be raised whether or not the

party raising the question has made in the district court an objection to such findings or has made a motion to amend them or a motion for judgment."

¹¹ See *Railroad Commission v. Maxey* (1930) 281 U. S. 82, 74 L. Ed. 717, 50 S. Ct. 228; *Baltimore & O. R. Co. v. United States* (1929) 279 U. S. 781, 73 L. Ed. 954, 49 S. Ct. 492; *Cleveland, C. & St. L. Ry. Co. v. United States* (1928) 275 U. S. 404, 72 L. Ed. 338, 48 S. Ct. 189; *Virginian Ry. Co. v. United States* (1926) 272 U. S. 658, 71 L. Ed. 463, 47 S. Ct. 222; *Louisville & N. R. Co. v. United States* (D. C. N. D. Ill., E. Div., 1934) 10 F. Supp. 185.

¹² *Cleveland, C. & St. L. Ry. Co. v. United States* (1928) 275 U. S. 404, 72 L. Ed. 338, 48 S. Ct. 189.

"The Commission's failure specifically to report the facts and give the reasons on which it concluded that under the circumstances the use of the average or group basis is justified leaves the parties in doubt as to a matter essential to the case and imposes unnecessary work upon the courts called upon to consider the validity of the order. Complete statements by the Commission showing the grounds upon which its determinations rest are quite as necessary as are opinions of lower courts setting forth the reasons on which they base their decisions in cases analogous

The importance is even greater where the decree enjoins the enforcement of a state law or the action of state officials thereunder. For then the respect due to the state demands that the need for nullifying the action of its legislature or of its executive officials be persuasively shown.¹³ Findings to support a conclusion against constitutionality need to be unequivocal.¹⁴ A general recital by the court that it has considered the evidence and that it appears therefrom that a valuation is not supported is insufficient.¹⁵ There are no findings of fact where, in the opinion, statements of fact are mingled with arguments and inferences for which there is no sufficient basis in evidence.¹⁶

The rule applies notwithstanding the fact that evidence was not offered on either side, so that the findings would be based on the pleadings, affidavits and exhibits attached to the complaint.¹⁷

to this." (Mr. Justice Butler in *Beaumont, S. L. & W. Ry. Co. v. United States* (1930) 282 U. S. 74, 86, 75 L. Ed. 221, 51 S. Ct. 1.)

¹³ *Public Service Commission v. Wisconsin Telephone Co.* (1933) 289 U. S. 67, 77 L. Ed. 1036, 53 S. Ct. 514; *Railroad Commission v. Maxey* (1930) 281 U. S. 82, 74 L. Ed. 717, 50 S. Ct. 228; *Lawrence v. St. Louis-San Francisco R. Co.* (1927) 274 U. S. 588, 71 L. Ed. 1219, 47 S. Ct. 720.

"No opinion was rendered by the District Court and, apart from the general statement above mentioned, the court made no findings. Not only did the court fail to set forth the facts pertinent to a conclusion that an interlocutory injunction should issue, but the court declared that the prescribed rates were confiscatory without any findings warranting such a conclusion. Appellee moves to affirm the decree. Appellants, resisting the motion, contend that the District Court abused its discretion and that the decree should be reversed, or at least should be set aside and the cause remanded for findings of fact and conclusions of law.

"We have repeatedly emphasized the importance of a statement of the grounds of decision, both as to facts and law, as an aid to litigants and to this Court. While it is always desirable that an appellate court should be adequately advised of the basis of the determination of the court below, we have pointed out that it is particularly important that this basis should appear when the decree enjoins the enforcement of a state law or the action of state officials under that law." (Mr. Chief Justice Hughes in *Public Service Commission v. Wisconsin Telephone Co.* (1933) 289 U. S. 67, 69, 77 L. Ed. 1036, 53 S. Ct. 514.)

¹⁴ *Mayo v. Lakeland Highlands Canning Co.* (1940) 309 U. S. 310, 84 L. Ed. 774, 60 S. Ct. 517.

¹⁵ *Railroad Commission v. Maxey* (1930) 281 U. S. 82, 74 L. Ed. 717, 50 S. Ct. 228.

¹⁶ *Mayo v. Lakeland Highlands Canning Co.* (1940) 309 U. S. 310, 84 L. Ed. 774, 60 S. Ct. 517.

¹⁷ *Louisville & N. R. Co. v. United States* (D. C. N. D. Ill., E. Div., 1934) 10 F. Supp. 185.

III. DECREE

§ 785. In General.

Where a commissioner, the defendant in a suit reviewing administrative action, dies after the case is argued and submitted in the Supreme Court, the court may give judgment *nunc pro tunc* as of the day the case was argued and submitted.¹⁸

Where the statute requires the court, upon an application for enforcement, to enter a decree affirming, modifying or setting aside the order as the situation may warrant, the decree, in case of affirmance or modification, should be broad enough to give effective relief and to prevent evasion.¹⁹

§ 786. Modification of Order.

The decree or order of a court enforcing an administrative order should ordinarily be made in accord with the terms of the agency's order.²⁰ But an administrative order may be modified by a reviewing court, modification being in substance a refusal to uphold the order in part, so long as the modification is based solely on the decision of judicial questions.²¹ For instance, some directions in the order may not be legally appropriate for the facts found. Where an order is legally valid to any substantial extent, it is not error for the court to refuse to treat it as void *in toto*. If a part only is invalid, the request for an adverse ruling should be directed to this part.²² Where an order of the National Labor Relations Board directed that respondent post notices in its plant which compelled an admission of guilt,

¹⁸ *Quon Quon Poy v. Johnson* (1927) 273 U. S. 352, 71 L. Ed. 680, 47 S. Ct. 346.

¹⁹ *Federal Trade Commission v. Wallace* (C. C. A. 8th, 1935) 75 F. (2d) 733.

²⁰ *National Labor Relations Board v. Biles-Coleman Lumber Co.* (C. C. A. 9th, 1938) 96 F. (2d) 197.

²¹ See § 424 et seq.

Federal Trade Commission.

Federal Trade Commission v. Morrissey (C. C. A. 7th, 1931) 47 F. (2d) 101; *Federal Trade Commission v. Good-Grape Co.* (C. C. A. 6th, 1930) 45 F. (2d) 70.

Interstate Commerce Commission.

Spiller v. Atchison, T. & S. F. R. Co. (1920) 253 U. S. 117, 64 L. Ed. 810, 40 S. Ct. 466.

National Labor Relations Board.

National Labor Relations Board v. A. S. Abell Co. (C. C. A. 4th, 1938) 97 F. (2d) 951; *National Labor Relations Board v. Bell Oil & Gas Co.* (C. C. A. 5th, 1937) 91 F. (2d) 509. *Secretary of the Interior.*

Work v. Louisiana (1925) 269 U. S. 250, 70 L. Ed. 259, 46 S. Ct. 92.

²² *Spiller v. Atchison, T. & S. F. R. Co.* (1920) 253 U. S. 117, 64 L. Ed. 810, 40 S. Ct. 466.

the court altered the form of the required notice before decreeing enforcement of the order.²³ Likewise, where an order directs the discharge of a new employee who had replaced one found to have been discharged in pursuance of an unfair labor practice, which new employee had been discharged afterwards in a reduction of the force, that part of the order is moot and not enforceable.²⁴ Orders of the Federal Trade Commission which direct relief greater than is legally appropriate for the facts found will be modified.²⁵

No modification should be made which in effect redetermines an administrative question, as such questions are within the legislative sphere.^{25a}

Where a lower court decree is inartificially framed, it may be modified by the Supreme Court on appeal as by striking out a supplemental clause which goes too far, and as modified, affirmed.²⁶ Thus a decree properly enjoining the Secretary of the Interior from imposing an illegal condition precedent to the determination of a land claim, but also requiring the Secretary to recognize that the claim has been established, will have the latter requirement stricken out, leaving the rest.²⁷

§ 787. Ancillary Relief.

Appropriate ancillary relief of a judicial nature may be granted in addition to ruling on the validity of administrative action.²⁸ Thus, when action has been taken under an administrative order held invalid on judicial review, the judicial decree may restore interested parties to the status quo.²⁹

In a case reviewing the validity of a Labor Board order, where complaint was made of a failure to give notice to an intervening party while the hearings were in progress although the court felt that the intervenor's interests were not actually prejudiced in any way, leave was granted to intervenor to petition the Board for a change in the

²³ National Labor Relations Board v. A. S. Abell Co. (C. C. A. 4th, 1938) 97 F. (2d) 951.

²⁴ National Labor Relations Board v. Bell Oil & Gas Co. (C. C. A. 5th, 1937) 91 F. (2d) 509.

²⁵ Federal Trade Commission v. Morrissey (C. C. A. 7th, 1931) 47 F. (2d) 101; Federal Trade Commission v. Good-Grape Co. (C. C. A. 6th, 1930) 45 F. (2d) 70.

^{25a} See § 505 et seq.

²⁶ Work v. Louisiana (1925) 269 U. S. 250, 70 L. Ed. 259, 46 S. Ct. 92.

²⁷ Work v. Louisiana (1925) 269 U. S. 250, 70 L. Ed. 259, 46 S. Ct. 92.

²⁸ The Chicago Junction Case (1924) 264 U. S. 258, 68 L. Ed. 667, 44 S. Ct. 317.

²⁹ The Chicago Junction Case (1924) 264 U. S. 258, 68 L. Ed. 667, 44 S. Ct. 317.

order, otherwise enforced, as it applied to intervener, by application to be made within twenty days after the filing of the court's opinion.³⁰

But no ancillary relief based on the determination by a court of an administrative question, may be granted.³¹

IV. REMAND TO ADMINISTRATIVE AGENCY

§ 788. Remand Essential for Completion of Legislative Process.

The function of remand by a court to an administrative agency is to commit remaining administrative questions, which are legislative in character,³² to the appropriate administrative arm of the legislature which has been entrusted with the power and duty of determining those questions.³³ This is to say that if an agency is found to have

³⁰ National Labor Relations Board v. Remington Rand, Inc. (C. C. A. 2d, 1938) 94 F. (2d) 862.

³¹ See § 505 et seq.

³² See § 505 et seq.

³³ Alien Cases.

Tod v. Waldman (1924) 266 U. S. 113, 69 L. Ed. 195, 45 S. Ct. 85; Mahler v. Eby (1924) 264 U. S. 32, 68 L. Ed. 549, 44 S. Ct. 283; Ex parte Harumi Motoshige (D. C. S. D. Cal., 1934) 6 F. Supp. 792.

Board of Review (Treasury Department).

Anniston Mfg. Co. v. Davis (1937) 301 U. S. 337, 81 L. Ed. 1143, 57 S. Ct. 816.

Board of Tax Appeals.

General Utilities & Operating Co. v. Helvering (1935) 296 U. S. 200, 80 L. Ed. 154, 56 S. Ct. 185; *Holvering v. Rankin (1935) 295 U. S. 123, 79 L. Ed. 1343, 55 S. Ct. 732; Helvering v. Taylor (1935) 293 U. S. 507, 79 L. Ed. 623, 55 S. Ct. 287; Doernbecher Mfg. Co. v. Commissioner of Internal Revenue (C. C. A. 9th, 1935) 80 F. (2d) 573; Helvering v. Kendrick Coal & Dock Co. (C. C. A. 8th, 1934) 72 F. (2d) 330, cert. den. (1935) 294 U. S. 716, 79 L. Ed. 1249, 55 S. Ct. 515; Commissioner of Internal Revenue v.

Langwell Real Estate Corp. (C. C. A. 7th, 1931) 47 F. (2d) 841.

Federal Communications Commission.

Fly v. Heitmeyer (1940) 309 U. S. 146, 84 L. Ed. 664, 60 S. Ct. 443; *Federal Communications Commission v. Pottsville Broadcasting Co. (1940) 309 U. S. 134, 84 L. Ed. 656, 60 S. Ct. 437; Rochester Telephone Corp. v. United States (1939) 307 U. S. 125, 83 L. Ed. 1147, 59 S. Ct. 754.

Federal Radio Commission.

Federal Radio Commission v. Nelson Bros. Bond & Mtg. Co. (1933) 289 U. S. 266, 77 L. Ed. 1166, 53 S. Ct. 627, 89 A. L. R. 406; Symons Broadcasting Co. v. Federal Radio Commission (1933) 62 App. D. C. 46, 64 F. (2d) 381.

Federal Trade Commission.

Federal Trade Commission v. Good-year Tire & Rubber Co. (1938) 304 U. S. 257, 82 L. Ed. 1326, 58 S. Ct. 863; Federal Trade Commission v. Royal Milling Co. (1933) 288 U. S. 212, 77 L. Ed. 706, 53 S. Ct. 335; Federal Trade Commission v. Baltimore Paint & Color Works (C. C. A. 4th, 1930) 41 F. (2d) 474.

Interstate Commerce Commission.

United States v. Griffin (1938) 303 U. S. 226, 82 L. Ed. 764, 58 S. Ct. 601;

acted on erroneous legal principles, it will be ordered on remand to proceed within the framework of its own discretionary authority on

United States v. Chicago, M., St. P. & P. R. Co. (1931) 282 U. S. 311, 75 L. Ed. 359, 51 S. Ct. 159; Southern R. Co. v. St. Louis Hay & Grain Co. (1909) 214 U. S. 297, 53 L. Ed. 1004, 29 S. Ct. 678; *Texas & P. R. Co. v. Abilene Cotton Oil Co. (1907) 204 U. S. 426, 51 L. Ed. 553, 27 S. Ct. 350; Louisville & N. R. Co. v. Behlmer (1900) 175 U. S. 648, 44 L. Ed. 309, 20 S. Ct. 209.

National Labor Relations Board.

*Ford Motor Co. v. National Labor Relations Board (1938) 305 U. S. 364, 83 L. Ed. 221, 59 S. Ct. 301; National Labor Relations Board v. Cowell Portland Cement Co. (C. C. A. 9th, 1939) 108 F. (2d) 198; National Labor Relations Board v. Botany Worsted Mills (C. C. A. 3d, 1939) 106 F. (2d) 263.

National Mediation Board.

Brotherhood of Railroad Trainmen v. National Mediation Board (1936) 66 App. D. C. 375, 88 F. (2d) 757.

Secretary of Agriculture.

United States v. Morgan (1939) 307 U. S. 183, 83 L. Ed. 1211, 59 S. Ct. 795.

State Agencies.

Laclede Gaslight Co. v. Public Service Commission (1938) 304 U. S. 398, 82 L. Ed. 1422, 58 S. Ct. 988; Southwestern Bell Telephone Co. v. Oklahoma (1938) 303 U. S. 206, 82 L. Ed. 751, 58 S. Ct. 528.

Quotations.

"It is familiar appellate practice to remand causes for further proceedings without deciding the merits, where justice demands that course in order that some defect in the record may be supplied. Such a remand may be made to permit further evidence to be taken or additional findings to be made upon essential points.

So, when a District Court has not made findings in accordance with our controlling rule (Equity Rule 70-1/2) it is our practice to set aside the decree and remand the cause for further proceedings. The jurisdiction to review the orders of the Labor Relations Board is vested in a court with equity powers, and while the court must act within the bounds of the statute and without intruding upon the administrative province, it may adjust its relief to the exigencies of the case in accordance with the equitable principles governing judicial action. The purpose of the judicial review is consonant with that of the administrative proceeding itself, — to secure a just result with a minimum of technical requirements. The statute with respect to a judicial review of orders of the Labor Relations Board follows closely the statutory provisions in relation to the orders of the Federal Trade Commission, and as to the latter it is well established that the court may remand the cause to the Commission for further proceedings to the end that valid and essential findings may be made. Federal Trade Comm'n v. Curtis Publishing Co., 260 U. S. 568, 583; International Shoe Co. v. Federal Trade Comm'n, 280 U. S. 291, 297; Federal Trade Comm'n v. Royal Milling Co., 288 U. S. 212, 218; Procter & Gamble Co. v. Federal Trade Comm'n, 11 F. 2d, 47, 48, 49; Ohio Leather Co. v. Federal Trade Comm'n, 45 F. 2d, 39, 42. Similar action has been taken under the National Labor Relations Act in Agwilines, Inc. v. National Labor Relations Board, 87 F. 2d 146, 155. See, also, National Labor Relations Board v. Bell Oil & Gas Co., 91 F. 2d 509, 515. The 'remand' does not encroach

the indicated correct principles.³⁴ Just as mandamus will lie to compel an administrative agency to act by exercising its discretion,³⁵ a reviewing court may remand a cause to an agency with directions to act by determining specified administrative matters, but not to determine them in a particular way. On remand an agency is bound

upon administrative functions. It means simply that the case is returned to the administrative body in order that it may take further action in accordance with the applicable law. See *Federal Radio Comm'n v. Nelson Brothers Co.*, 289 U. S. 266, 278.

"Such a remand does not dismiss or terminate the administrative proceeding. If findings are lacking which may properly be made upon the evidence already received, the court does not require the evidence to be reheard. *Federal Trade Comm'n v. Curtis Publishing Co.*, supra; *International Shoe Co. v. Federal Trade Comm'n*, supra. If further evidence is necessary and available to supply the basis for findings on material points, that evidence may be taken. *Federal Trade Comm'n v. Royal Milling Co.*, supra; *Procter & Gamble Co. v. Federal Trade Comm'n*, supra; *Ohio Leather Co. v. Federal Trade Comm'n*, supra; *Agwilines, Inc. v. National Labor Relations Board*, supra. Whatever findings or order may subsequently be made will be subject to challenge if not adequately supported or the Board has failed to act in accordance with the statutory requirements." (Mr. Chief Justice Hughes in *Ford Motor Co. v. National Labor Relations Board* (1939) 305 U. S. 364, 373, 374, 83 L. Ed. 221, 59 S. Ct. 301.)

"2. The cases of *Cincinnati, New Orleans & Texas Pacific Ry. Co. v. Interstate Commerce Commission*, 162 U. S. 184; *Louisville & Nashville R. R. Co. v. Behlmer*, 175 U. S. 648, and *Interstate Commerce Commission v.*

Louisville & Nashville R. R. Co., 190 U. S. 273, involved the enforcement against carriers of orders of the Commission. After deciding that the orders of the Commission were not entitled to be enforced, because of errors of law committed by that body, this court declined to consider the question of the reasonableness *per se* of the rates as an original question; in other words, the correction of the established schedule without previous consideration of the subject by the Commission. It was pointed out that by the effect of the act to regulate commerce it was peculiarly within the province of the Commission to primarily consider and pass upon a controversy concerning the unreasonableness *per se* of the rates fixed in an established schedule. It was, therefore, declared to be the duty of the courts, where the Commission had not considered such a disputed question, to remand the case to the Commission to enable it to perform that duty, a conclusion wholly incompatible with the conception that courts, in independent proceedings, were empowered by the act to regulate commerce, equally with the Commission, primarily to determine the reasonableness of rates in force through an established schedule." (Mr. Justice White in *Texas & P. R. Co. v. Abilene Cotton Oil Co.* (1907) 204 U. S. 426, 443, 444, 51 L. Ed. 553, 27 S. Ct. 350.)

³⁴ *Rochester Telephone Corp. v. United States* (1939) 307 U. S. 125, 83 L. Ed. 1147, 59 S. Ct. 754.

³⁵ See § 688 et seq.

by a court's correction of errors of law, but an administrative determination in which is imbedded a legal question open to judicial review does not impliedly foreclose the administrative agency, after its error has been corrected, from enforcing the legislative policy committed to its charge.³⁶ Thus after invalidating an administrative order for an error of law, remand to the agency is appropriate to direct that any remaining administrative questions which should be determined, be determined in accordance with the correct principles of law laid down by the court.³⁷

§ 789. Purposes for Which Causes May Be Remanded to Agencies.

A case may be remanded to an agency so that further evidence may be taken,³⁸ additional findings may be made,³⁹ or a new party may be joined.⁴⁰ Thus the Circuit Court of Appeals is without power on review of proceedings of the Board of Tax Appeals to make any findings

³⁶ Federal Communications Commission v. Pottsville Broadcasting Co. (1940) 309 U. S. 134, 84 L. Ed. 656, 60 S. Ct. 437; Federal Radio Commission v. Nelson Bros. Bond & Mtg. Co. (1933) 289 U. S. 266, 77 L. Ed. 1166, 53 S. Ct. 627, 89 A. L. R. 406.

³⁷ Federal Communications Commission v. Pottsville Broadcasting Co. (1940) 309 U. S. 134, 84 L. Ed. 656, 60 S. Ct. 437.

³⁸ Alien Cases.

Ex parte Harumi Motoshige (D. C. S. D. Cal., 1934) 6 F. Supp. 792.

Board of Tax Appeals.

Helvering v. Taylor (1935) 293 U. S. 507, 79 L. Ed. 623, 55 S. Ct. 287; Commissioner of Internal Revenue v. Langwell Real Estate Corp. (C. C. A. 7th, 1931) 47 F. (2d) 841.

Federal Trade Commission.

Federal Trade Commission v. Royal Milling Co. (1933) 288 U. S. 212, 77 L. Ed. 706, 53 S. Ct. 335.

National Labor Relations Board.

*Ford Motor Co. v. National Labor Relations Board (1938) 305 U. S. 364, 83 L. Ed. 221, 59 S. Ct. 301.

National Mediation Board.

Brotherhood of Railroad Trainmen v. National Mediation Board (1936) 66 App. D. C. 375, 88 F. (2d) 757.

³⁹ Board of Tax Appeals.

General Utilities & Operating Co. v. Helvering (1935) 296 U. S. 200, 80 L. Ed. 154, 56 S. Ct. 185; Doernbecher Mfg. Co. v. Commissioner of Internal Revenue (C. C. A. 9th, 1935) 80 F. (2d) 573; Helvering v. Kendrick Coal & Dock Co. (C. C. A. 8th, 1934) 72 F. (2d) 330, cert. den. (1935) 294 U. S. 716, 79 L. Ed. 1249, 55 S. Ct. 515.

Interstate Commerce Commission.

Louisville & N. R. Co. v. Behlmer (1900) 175 U. S. 648, 44 L. Ed. 309, 20 S. Ct. 209; *Texas & P. R. Co. v. Abilene Cotton Oil Co. (1907) 204 U. S. 426, 51 L. Ed. 553, 27 S. Ct. 350; Southern R. Co. v. St. Louis Hay & Grain Co. (1909) 214 U. S. 297, 53 L. Ed. 1004, 29 S. Ct. 678.

National Labor Relations Board.

Ford Motor Co. v. National Labor Relations Board (1938) 305 U. S. 364, 83 L. Ed. 221, 59 S. Ct. 301.

⁴⁰ National Labor Relations Board v. Cowell Portland Cement Co. (C. C.

of fact respecting the administrative proceedings. If the Board has failed to make an essential finding and the record on review is insufficient to provide the basis for a final determination, the proper procedure is to remand the case for further proceedings before the Board.⁴¹ Where a taxpayer shows that the determination of the Commissioner of Internal Revenue is arbitrary, but not how much, if anything, the tax should be, the court rightly remands to the Board of Tax Appeals for further proceedings.⁴²

Remand may also be with directions to take such further action in the premises as the law requires in view of the annulment and setting aside of an order,⁴³ or in view of the enforcement of an order,⁴⁴ which may mean to take such further proceedings as the framework of the statute permits.⁴⁵ Where a petition for enforcement of a Federal Trade Commission order was granted, the case was remanded for the agency to take proof on the question whether the order had been violated.⁴⁶

Remand may be for the purpose of modifying an order held to be too drastic as a remedy for the facts found.⁴⁷

Remand may be made only on good grounds, not on frivolous grounds or for any purpose that might be considered dilatory or vexatious.⁴⁸

When a case is remanded to a district court for further proceedings in conformity with the appellate court's opinion, what further proceedings the agency may see fit to take in the light of the appellate court's decision, or what determinations the district court may make in relation to any such proceedings, are not matters which the appellate court should attempt to forecast or hypothetically decide.⁴⁹

A. 9th, 1939) 108 F. (2d) 198; *Symons Broadcasting Co. v. Federal Radio Commission* (1933) 62 App. D. C. 46, 64 F. (2d) 381.

⁴¹ *General Utilities & Operating Co. v. Helvering* (1935) 296 U. S. 200, 80 L. Ed. 154, 56 S. Ct. 185.

⁴² *Helvering v. Taylor* (1935) 293 U. S. 507, 79 L. Ed. 623, 55 S. Ct. 287.

⁴³ See *United States v. Griffin* (1938) 303 U. S. 226, 82 L. Ed. 764, 58 S. Ct. 601.

⁴⁴ *Federal Trade Commission v. Baltimore Paint & Color Works* (C. C. A. 4th, 1930) 41 F. (2d) 474.

⁴⁵ *United States v. Morgan* (1939) 307 U. S. 183, 83 L. Ed. 1211, 59 S. Ct. 795.

⁴⁶ *Federal Trade Commission v. Baltimore Paint & Color Works* (C. C. A. 4th, 1930) 41 F. (2d) 474.

⁴⁷ *Federal Trade Commission v. Royal Milling Co.* (1933) 288 U. S. 212, 77 L. Ed. 706, 53 S. Ct. 335.

⁴⁸ See *Ford Motor Co. v. National Labor Relations Board* (1938) 305 U. S. 364, 83 L. Ed. 221, 59 S. Ct. 301.

⁴⁹ *United States v. Morgan* (1939) 307 U. S. 183, 83 L. Ed. 1211, 59 S. Ct. 795.

§ 790. Form of Remand.

The remand may be in form to the court below with directions which only the agency can carry out, thus implying remand by the lower court to the agency,⁵⁰ or to a lower court with express directions to remand to the agency,⁵¹ and remand may be to an agency without any directions.⁵²

The express provision of remand, with or without specific directions, is not always necessary to institute further administrative proceedings. The failure to remand a case to an administrative agency for a specific purpose does not preclude further administrative proceedings. An agency is always free to conduct such further proceedings as lie within its statutory powers, and when an administrative order has been invalidated upon judicial review it is often necessary that further administrative proceedings be had in the absence of specific remand by the court.⁵³

§ 791. Significance of Remand: Coordination of Judicial and Legislative Spheres.

Remand thus marks the end of exercise of the judicial power, and continuance of any remaining legislative character of the cause under the jurisdiction of the appropriate administrative arm of the legislature. It establishes the necessary mechanical link between the judicial and legislative spheres at the conclusion of judicial review. It is thus coordinate with questions of jurisdiction of the judicial power. Just as the opportunity for judicial review should prevent encroachment by the legislative upon the judicial sphere, remand should prevent encroachment by the judicial upon the legislative. Use of the power of remand goes to the very foundation of the relationship between courts and agencies.⁵⁴

⁵⁰ Federal Trade Commission v. Royal Milling Co. (1933) 288 U. S. 212, 77 L. Ed. 706, 53 S. Ct. 335.

⁵¹ Laeclde Gaslight Co. v. Public Service Commission (1938) 304 U. S. 398, 82 L. Ed. 1422, 58 S. Ct. 988.

⁵² See Federal Trade Commission v. Goodyear Tire & Rubber Co. (1938) 304 U. S. 257, 82 L. Ed. 1326, 58 S. Ct. 863.

⁵³ See United States v. Chicago, M., St. P. & P. R. Co. (1931) 282 U. S. 311, 75 L. Ed. 359, 51 S. Ct. 159.

⁵⁴ "A much deeper issue, however, is here involved. This was not a mandate from court to court but from a court to an administrative agency. What is in issue is not the relationship of federal courts *inter se*—a relationship defined largely by the courts themselves—but the due observance by courts of the distribution of authority made by Congress as between its power to regulate commerce and the reviewing power which it has conferred upon the courts under Arti-

§ 792. Rules of Remand to Lower Court Do Not Apply.

The technical rules derived from the relations of courts *inter sese* cannot be applied mechanically to agencies. Thus the doctrine that a lower court is bound to respect the mandate of an appellate tribunal and cannot reconsider questions which it has decided is inapplicable to remand to an agency.⁵⁵ For instance where a license application has been denied by an agency, because of an error of law, a reviewing court cannot, by mandamus, compel the agency to reconsider the application "on the basis of the record as originally made, and in accordance with the opinions" of the court.⁵⁶ The agency is free to set the application down for hearing on a comparative basis with subsequently filed rival applications, and to reopen the record and take new evidence on the comparative ability of the various applicants to satisfy "public convenience, interest, or necessity."⁵⁷

§ 793. Court May Require Further Administrative Action Within Reasonable Time.

The administrative agency is bound to follow the purpose of the remand, and if it should fail to do so, the reviewing court may vacate the remand order and make such disposition of the suit for judicial review as may be just.⁵⁸ A court may provide for final disposition of

ele III of the Constitution. A review by a federal court of the action of a lower court is only one phase of a single unified process. But to the extent that a federal court is authorized to review an administrative act, there is superimposed upon the enforcement of legislative policy through administrative control a different process from that out of which the administrative action under review ensued. The technical rules derived from the interrelationship of judicial tribunals forming a hierarchical system are taken out of their environment when mechanically applied to determine the extent to which Congressional power, exercised through a delegated agency, can be controlled within the limited scope of 'judicial power' conferred by Congress under the Constitution." (Mr. Justice Frankfurter in Federal

Communications Commission v. Pottsville Broadcasting Co. (1940) 309 U. S. 134, 141, 84 L. Ed. 656, 60 S. Ct. 437.)

⁵⁵ Federal Communications Commission v. Pottsville Broadcasting Co. (1940) 309 U. S. 134, 84 L. Ed. 656, 60 S. Ct. 437.

⁵⁶ Federal Communications Commission v. Pottsville Broadcasting Co. (1940) 309 U. S. 134, 84 L. Ed. 656, 60 S. Ct. 437.

⁵⁷ Fly v. Heitmeyer (1940) 309 U. S. 146, 84 L. Ed. 664, 60 S. Ct. 443.

⁵⁸ Ford Motor Co. v. National Labor Relations Board (1938) 305 U. S. 364, 83 L. Ed. 221, 59 S. Ct. 301; Helvering v. Kendrick Coal & Dock Co. (C. C. A. 8th, 1934) 72 F. (2d) 330, cert. den. (1935) 294 U. S. 716, 79 L. Ed. 1249, 55 S. Ct. 515.

the case without further administrative action, if administrative action on the remand is not taken within a reasonable time.⁵⁹ Thus upon application for a writ of habeas corpus the proceedings may be remanded to the agency for the determination of remaining administrative questions, with the condition that the relator be discharged from custody unless administrative proceedings for the determination of those questions be instituted within thirty days.⁶⁰

§ 794. Constitutional and Statutory Provisions.

The Oklahoma Constitution⁶¹ provides for a legislative review by the Supreme Court of Oklahoma of orders of the Corporation Commission, expressly giving the Supreme Court power to remand a case to the Commission for further proceedings.⁶²

The Revenue Act of 1936⁶³ provides expressly for remand by a Circuit Court of Appeals to the Board of Review, if required in the interests of justice, and gives the courts power to "direct the Board to enter any designated judgment."⁶⁴

V. COSTS

§ 795. In General.

Costs in suits involving judicial review of administrative orders are governed by the usual provisions. Where a statute requires that a utility is to pay the cost of rate proceedings, it must pay the costs of an appeal in legislative review by the courts, even though the appeal be taken, and dismissed, by the regulatory administrative agency.⁶⁵

⁵⁹ *Tod v. Waldman* (1924) 266 U. S. 113, 69 L. Ed. 195, 45 S. Ct. 85;

* *Mahler v. Eby* (1924) 264 U. S. 32, 68 L. Ed. 549, 44 S. Ct. 283.

⁶⁰ *Tod v. Waldman* (1924) 266 U. S. 113, 69 L. Ed. 195, 45 S. Ct. 85; *Mahler v. Eby* (1924) 264 U. S. 32, 68 L. Ed. 549, 44 S. Ct. 283.

⁶¹ Article IX, § 22.

⁶² See *Southwestern Bell Telephone*

Co. v. Oklahoma (1938) 303 U. S. 206, 82 L. Ed. 751, 58 S. Ct. 528.

⁶³ 7 USCA 648 (g).

⁶⁴ *Anniston Mfg. Co. v. Davis* (1937) 301 U. S. 337, 81 L. Ed. 1143, 57 S. Ct. 816.

⁶⁵ *Washington Ry. & Electric Co. v. District of Columbia* (1935) 64 App. D. C. 243, 77 F. (2d) 366.

CHAPTER 46

APPEALS

I. IN GENERAL

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I. IN GENERAL

§ 796. Introduction.

This chapter discusses appeals in suits for judicial review, that is, appeals in judicial proceedings only. "Appeals" in administrative proceedings are treated elsewhere.¹ A suit in the nature of judicial

¹ See § 226 et seq.

review which is denominated an "appeal" from an agency to a court is likewise discussed elsewhere.²

§ 797. Appeal to the Supreme Court Only from Courts Acting Judicially.

In the absence of special enactment, such as that providing for certification of questions by the Court of Claims,³ appeal to the United States Supreme Court can be had only where court review in the case in question is judicial,⁴ at least in part.⁵ The mere fact that a court acts in a judicial capacity in other cases does not give the right to appeal a case of legislative review.⁶

§ 798. Parties in General.

Where a party's interests are already fully represented, an order refusing its application to intervene is not of such a final character as to furnish a basis for appeal, unless there are exceptional circumstances. Such refusal is completely in the discretion of the trial court.⁷ In a suit to enjoin state gas rates as confiscatory, where the commission, defendant in the district court, is abolished later, and another defendant appeals, the latter need not make the commission a party on appeal, nor issue summons and severance against it.⁸ Questions of substitution of parties on appeal are treated elsewhere.⁹

§ 799. Appeal from Decree Granting an Interlocutory Injunction.

The general rule that in reviewing an equity district court's refusal to grant an interlocutory injunction the only question to be considered by the appellate court is whether there was an abuse of the lower court's discretion, does not apply where the injunction was prayed against an administrative order of such character that decision on an

² See § 625 et seq.

³ See *Humphrey v. United States* (1935) 295 U. S. 602, 79 L. Ed. 1611, 55 S. Ct. 869.

⁴ *Southwestern Bell Telephone Co. v. Oklahoma* (1938) 303 U. S. 206, 82 L. Ed. 751, 58 S. Ct. 528; *Federal Radio Commission v. Nelson Bros. Bond & Mtg. Co.* (1933) 289 U. S. 266, 77 L. Ed. 1166, 53 S. Ct. 627, 89 A. L. R. 406. See *Federal Communications Commission v. Pottsville Broadcasting Co.* (1940) 309 U. S. 134, 84 L. Ed. 656, 60 S. Ct. 437.

⁵ *Clark's Ferry Bridge Co. v. Public Service Commission* (1934) 291 U. S. 227, 78 L. Ed. 767, 54 S. Ct. 427.

⁶ See *Federal Communications Commission v. Pottsville Broadcasting Co.* (1940) 309 U. S. 134, 84 L. Ed. 656, 60 S. Ct. 437.

⁷ *City of New York v. New York Telephone Co.* (1923) 261 U. S. 312, 67 L. Ed. 673, 43 S. Ct. 372.

⁸ *Newton v. Consolidated Gas Co.* (1924) 265 U. S. 78, 68 L. Ed. 909, 44 S. Ct. 481.

⁹ See §§ 721, 722.

application for an interlocutory injunction may in many respects be the equivalent of a final decree.¹⁰ An appeal from an interlocutory injunction will be dismissed where the interlocutory injunction has been followed by a permanent injunction from which appeal is taken. The former appeal merges in the latter.¹¹

An interlocutory injunction under Judicial Code section 266 will be vacated on appeal unless the findings of fact and conclusions of law of the court upon which it is based are set out.¹²

§ 800. Stay Pending Appeal.

Once a decree has been entered by a lower court sustaining an administrative order, enforcement of the order is not stayed by the mere taking of an appeal under the Urgent Deficiencies Act.¹³ In that event, enforcement of an administrative order may only be restrained by a stay pending appeal. The obtaining of such a stay is not a matter of right, even if irreparable injury might otherwise result to the party affected. It is an exercise of judicial discretion, the propriety of its issue being dependent upon the circumstances of the particular case.¹⁴ It may be issued in the discretion of the court which made the decree appealed from,¹⁵ or in the discretion of the Supreme Court or a justice thereof.¹⁶ The Supreme Court may refer an application for a stay pending appeal to the court which made the decree appealed from, as best qualified to pass on the question.¹⁷ Where the decree has been made by a three-judge district court, one

¹⁰ *Louisville & N. R. Co. v. United States* (1915) 238 U. S. 1, 59 L. Ed. 1177, 35 S. Ct. 696.

¹¹ *Smith v. Illinois Bell Telephone Co.* (1926) 270 U. S. 587, 70 L. Ed. 747, 46 S. Ct. 408; *Pacific Telephone & Telegraph Co. v. Kuykendall* (1924) 265 U. S. 106, 68 L. Ed. 975, 44 S. Ct. 553.

¹² See §§ 721, 722.

¹³ 28 USCA 47a. *Virginian Ry. Co. v. United States* (1926) 272 U. S. 653, 71 L. Ed. 463, 47 S. Ct. 222. See also § 633 et seq.

¹⁴ *Virginian Ry. Co. v. United States* (1926) 272 U. S. 653, 71 L. Ed. 463, 47 S. Ct. 222.

¹⁵ *Beaumont, S. L. & W. R. Co. v. United States* (1930) 282 U. S. 74, 75 L. Ed. 221, 51 S. Ct. 1; **Virginian*

Ry. Co. v. United States (1926) 272 U. S. 658, 71 L. Ed. 463, 47 S. Ct. 222; *Kroger Grocery & Baking Co. v. Lutz* (1936) 299 U. S. 300, 81 L. Ed. 251, 57 S. Ct. 215.

¹⁶ *Virginian Ry. Co. v. United States* (1926) 272 U. S. 653, 71 L. Ed. 463, 47 S. Ct. 222; *Omaha & C. B. Street R. Co. v. Interstate Commerce Commission* (1911) 222 U. S. 582, 56 L. Ed. 324, 32 S. Ct. 833. See *Cumberland Telephone & Telegraph Co. v. Louisiana Public Service Commission* (1922) 260 U. S. 212, 67 L. Ed. 217, 43 S. Ct. 75.

¹⁷ *Cumberland Telephone & Telegraph Co. v. Louisiana Public Service Commission* (1922) 260 U. S. 212, 67 L. Ed. 217, 43 S. Ct. 75.

judge does not have power to issue a stay pending appeal, although it may be issued by the three-judge court.¹⁸ Thus where a temporary stay was issued by one judge of a three-judge district court who stated that it had been considered by the other two judges and one of the other two judges had written a letter indicating approval, the stay was invalid.¹⁹

Where the decree is affirmed the Supreme Court will not pass on the portion of the decree staying enforcement of the administrative order pending appeal.²⁰ An appeal from a decree or order granting a stay pending appeal will be dismissed as moot where the stay has been vacated.²¹

The Court of Appeals of the District of Columbia has held that it has no power to stay orders of the Federal Radio Commission.²²

§ 801. — Grounds for Stay Pending Appeal.

Facts demonstrating irreparable injury which would ordinarily be sufficient to justify the granting of a temporary or interlocutory stay or injunction pending final hearing, must be shown to justify the issuance of a stay pending appeal.²³ Only strong reasons justify the issuance of such a stay.²⁴ Strong reasons are necessary because the decree denying the injunction creates a strong presumption of its own correctness and of the validity of the agency's order. This presumption ordinarily entitles the public and private interests which may be affected to the benefits which the order was intended to secure.²⁵ Where, in a rate case, refusal to grant an injunction would, if the Supreme Court should decide that complainant was entitled to the injunction, work irremediable injury, a restraining order will be

¹⁸ *Cumberland Telephone & Telegraph Co. v. Louisiana Public Service Commission* (1922) 260 U. S. 212, 67 L. Ed. 217, 43 S. Ct. 75.

¹⁹ *Cumberland Telephone & Telegraph Co. v. Louisiana Public Service Commission* (1922) 260 U. S. 212, 67 L. Ed. 217, 43 S. Ct. 75.

²⁰ *Chesapeake & O. Ry. Co. v. United States* (1935) 296 U. S. 187, 80 L. Ed. 147, 56 S. Ct. 164.

²¹ *Ohio v. United States* (1934) 292 U. S. 498, 78 L. Ed. 1388, 54 S. Ct. 792.

²² *General Broadcasting System v. Bridgeport Broadcasting System* (D. C. D. Conn., 1931) 53 F. (2d) 664.

²³ *Virginian Ry. Co. v. United States* (1926) 272 U. S. 658, 71 L. Ed. 463, 47 S. Ct. 222.

²⁴ *Merchants Warehouse Co. v. United States* (1931) 283 U. S. 501, 75 L. Ed. 1227, 51 S. Ct. 505; *Virginian Ry. Co. v. United States* (1926) 272 U. S. 658, 71 L. Ed. 463, 47 S. Ct. 222; *Cumberland Telephone & Telegraph Co. v. Louisiana Public Service Commission* (1922) 260 U. S. 212, 67 L. Ed. 217, 43 S. Ct. 75.

²⁵ *Virginian Ry. Co. v. United States* (1926) 272 U. S. 658, 71 L. Ed. 463, 47 S. Ct. 222.

continued pending an opportunity for a review in the Supreme Court.²⁶

The following considerations, taken together, call for the exercise of the court's discretion to stay: where the practice complained of is of long standing, entered into in good faith at a time when discrimination, if it existed, was much less serious than presently, and before present prohibitions against such discriminations; its legality is still not free from doubt, as indicated by the fact that the court decision is not unanimous, and the immediate enforcement of the order would result in a serious and unnecessary disturbance of a course of business affecting not only present parties but others, which the court finds will be irreparable.²⁷ However, the mere fact that the district court was not unanimous in denying the injunction does not justify the issuance of a stay.²⁸ And where a second appeal is taken due to a mistake in a prior attack on an order, the court may deny a stay pending appeal, although there will be some irreparable loss, when the amount will not be very large. To impose a possible loss is a less evil than to permit the party to have longer benefit of a restraining order as the result of its own mistake. The record from a three-judge court can be taken to the Supreme Court in a few days. If that court thinks the attacking party should have an injunction it can speedily give that relief.²⁹

§ 802. Administrative Action Pending Appeal.

Once a court exercises jurisdiction to review the findings or order of an administrative agency, the agency is without power to act inconsistently with the court's jurisdiction.³⁰ But where a suit for mandamus to compel an agency to conduct a hearing in a particular way has been decided in the agency's favor in the lower court, the agency may continue and conclude the hearing pending appeal, no injunction or stay having been issued.³¹

²⁶ *Louisville & N. R. Co. v. Garrett* (C. C. E. D. Ky., 1911) 186 Fed. 176, *aff'd* (1913) 231 U. S. 298, 58 L. Ed. 229, 34 S. Ct. 48.

²⁷ *Merchants Warehouse Co. v. United States* (1931) 283 U. S. 501, 75 L. Ed. 1227, 51 S. Ct. 505.

²⁸ *Virginian Ry. Co. v. United States* (1926) 272 U. S. 658, 71 L. Ed. 463, 47 S. Ct. 222.

²⁹ *Louisville & N. R. Co. v. Finn* (D. C. E. D. Ky., 1914) 214 Fed. 465,

aff'd 235 U. S. 601, 59 L. Ed. 379, 35 S. Ct. 146.

³⁰ *Inland Steel Co. v. United States* (1939) 306 U. S. 153, 83 L. Ed. 557, 59 S. Ct. 415. See *Ford Motor Co. v. National Labor Relations Board* (1938) 305 U. S. 364, 83 L. Ed. 221, 59 S. Ct. 301.

³¹ *Norwegian Nitrogen Products Co. v. United States Tariff Commission* (1927) 274 U. S. 106, 71 L. Ed. 949, 47 S. Ct. 499.

The effect of a temporary or interlocutory stay or injunction upon an administrative order is treated elsewhere.³²

§ 803. Stay by Appellate Court Pending Further Disposition of Case.

Where a decree granting an interlocutory injunction is vacated and the cause remanded to the district court for further action appropriate to a decision upon an application for an interlocutory injunction, the Supreme Court may order the temporary restraining order to remain in force pending that decision.³³ And where a decree denying an interlocutory injunction is vacated in the Supreme Court and the cause remanded because a party has failed to exhaust a state administrative remedy, the restraining order may be continued. If, after hearing, the agency adheres to the view attacked, further proceedings appropriate to the situation may be had in the district court.³⁴

§ 804. Assignment of Error.

It is said that only points made or questions raised below will be reviewed by a federal appellate court in cases appealed either from a lower court or from an agency.³⁵ Equity Rule 75 required that the record on appeal be condensed. Supreme Court Rule 27, formerly Rule 21, requires the brief on appeal to refer to the page of the record and the authorities relied on in support of each point. Where these rules are ignored or neglected, so that the court would have to read and brief a voluminous record itself, in order to discover if it contained a basis for deciding upon an assignment of error, such as the failure to consider going value in a rate case, the court will decline to consider the assignment of error.³⁶ The question of the lack of evidence to support a finding should ordinarily be presented by assignment of error.³⁷ However, under Rule 9 of the Rules of the Supreme Court, a fundamental defect, such as the absence of a quasi-jurisdic-

³² See § 739.

³³ *Public Service Commission v. Wisconsin Telephone Co.* (1933) 289 U. S. 67, 77 L. Ed. 1036, 53 S. Ct. 514.

³⁴ *St. Louis-San Francisco R. Co. v. Alabama Public Service Commission* (1929) 279 U. S. 560, 73 L. Ed. 843, 49 S. Ct. 383.

³⁵ *Kottemann v. Commissioner of*

Internal Revenue (C. C. A. 9th, 1936) 81 F. (2d) 621. But see § 239 et seq.

³⁶ *Houston v. Southwestern Bell Telephone Co.* (1922) 259 U. S. 318, 66 L. Ed. 961, 42 S. Ct. 486.

³⁷ *Commissioner of Internal Revenue v. Purdy* (C. C. A. 1st, 1939) 102 F. (2d) 331.

tional administrative finding,³⁸ may nevertheless be considered by the Supreme Court even though not specifically assigned as error.

§ 805. Contents of Record on Appeal.

The expense of printing a record on appeal is often a substantial factor in the determination of whether an appeal will be taken, since the transcript often runs into thousands of pages. Moreover, it is seldom pretended that the major portion of such a record is actually scrutinized by the court. Where the question of substantial evidence to support the findings is present, litigants should be encouraged to shorten the printed record to those parts only which are material, saving their rights against unforeseen developments by stipulating that any part of the certified administrative record which is not printed, may be referred to and quoted by counsel in briefs or argument.

Where the point is that the facts found do not as a matter of law support the order made, rather than that the evidence does not support the findings, the Supreme Court has emphasized that it is good practice not to put in the record on appeal the record of the hearing before the agency containing the evidence there taken.³⁹

§ 806. When Amendments to Pleadings Before Agency Are Considered Made in Supreme Court.

Appropriate amendments in the pleadings before an agency may be deemed to have been made in the Supreme Court.⁴⁰ And a petition by a shipper to modify a reparation order by reducing the amount payable may be treated as a remittitur, and the modifying order as the entry of the remittitur.⁴¹

§ 807. Weight of Findings of Fact by Court Upon Trial De Novo.

Where it is contended that legislation or an administrative order is constitutionally invalid, and where that invalidity rests upon disputed questions of fact, the invalidating facts must be proved to the

³⁸ *Mahler v. Eby* (1924) 264 U. S. 32, 68 L. Ed. 549, 44 S. Ct. 283.

³⁹ *Louisville & N. R. Co. v. United States* (1915) 238 U. S. 1, 59 L. Ed. 1177, 35 S. Ct. 696.

⁴⁰ *Louisville & N. R. Co. v. Sloss-*

Sheffield Steel & Iron Co. (1925) 269 U. S. 217, 70 L. Ed. 242, 46 S. Ct. 73.

⁴¹ *Louisville & N. R. Co. v. Sloss-Sheffield Steel & Iron Co.* (1925) 269 U. S. 217, 70 L. Ed. 242, 46 S. Ct. 73.

satisfaction of the reviewing court. In view of the character of the judicial power invoked in such cases it is not tolerable that its exercise should rest securely upon the findings of a master even though they be confirmed by the trial court. The power is best safeguarded from abuse by preserving to the appellate court complete freedom in dealing with the facts of each case. In such cases there are no artificial rules as to the weight of the master's findings to fetter the appellate court's action.⁴² But weight naturally attaches to findings of fact by a trial court which are supported by substantial evidence.⁴³ Where findings of a lower court rejected the claim of confiscation, and the evidence and the conclusions to be drawn from it on that issue were uncertain and speculative, the findings will not be disturbed or its disposition of the cause changed.⁴⁴

When trial *de novo* is in a state court, the provisions of state law govern the weight to be given findings of the trial court, subject to review by the Supreme Court.⁴⁵ In many states the rule is the same as that in the federal courts.⁴⁶ But if an inferior state appellate court improperly applies the state law the Supreme Court will give the weight to the trial court's findings rightfully accorded by state law.⁴⁷ The findings of the trial court may not be set aside in an appellate court on the ground that the trial court applied an improper standard of proof, where the standard of proof applied was in fact proper. And where an intermediate state appellate court has improperly vacated the lower court's findings for this reason, the Supreme Court of the United States will accord the findings the true effect required of state law.⁴⁸ The Supreme Court will analyze the facts proven in

⁴² *Knoxville v. Knoxville Water Co.* (1909) 212 U. S. 1, 53 L. Ed. 371, 29 S. Ct. 148.

⁴³ *United States v. Idaho* (1936) 298 U. S. 105, 80 L. Ed. 1070, 56 S. Ct. 690; *Rowland v. Boyle* (1917) 244 U. S. 106, 61 L. Ed. 1022, 37 S. Ct. 577.

⁴⁴ **Brush Electric Co. v. Galveston* (1923) 262 U. S. 443, 67 L. Ed. 1076, 43 S. Ct. 606.

⁴⁵ *Lone Star Gas Co. v. Texas* (1938) 304 U. S. 224, 82 L. Ed. 1304, 58 S. Ct. 883, rehearing denied 304 U. S. 590, 82 L. Ed. 1549, 58 S. Ct. 1051.

⁴⁶ See *Lone Star Gas Co. v. Texas* (1938) 304 U. S. 224, 82 L. Ed. 1304, 58 S. Ct. 883, rehearing denied 304 U. S. 590, 82 L. Ed. 1549, 58 S. Ct. 1051.

⁴⁷ *Lone Star Gas Co. v. Texas* (1938) 304 U. S. 224, 82 L. Ed. 1304, 58 S. Ct. 883, rehearing denied 304 U. S. 590, 82 L. Ed. 1549, 58 S. Ct. 1051.

⁴⁸ *Lone Star Gas Co. v. Texas* (1938) 304 U. S. 224, 82 L. Ed. 1304, 58 S. Ct. 883, rehearing denied 304 U. S. 590, 82 L. Ed. 1549, 58 S. Ct. 1051.

a state court where it is claimed that the state procedure has denied a federal right.⁴⁹

Where trial *de novo* has been had, the fact that the trial court reached the same conclusion on a question of fact that the agency reached, does not justify application of the rule that where two courts have reached the same conclusion on a question of fact it will be accepted in the appellate court unless clearly erroneous, since the agency acts legislatively and not judicially.⁵⁰

§ 808. Arguments on Appeal Must Have Been Urged Below.

Under a general rule of litigation a party may not urge a contention on appeal which was not made below.⁵¹ Upon appeal under Judicial Code, section 266, the Supreme Court will not pass on an issue not shown by the bill, but only by an opposing affidavit used at the injunction hearing.⁵²

Although questions of jurisdiction of a court may always be raised on appeal, even by the court, *sua sponte*, when they have not been raised below,⁵³ the argument that an administrative agency did not have statutory power to make an order complained of, not made to the agency or the lower court, may apparently not be considered in the Supreme Court.⁵⁴

Constitutional questions, such as confiscation, must be raised below and component questions of the broad question of confiscation must likewise be raised in the lower court, including methods of computing value,⁵⁵ and methods of computing a depreciation allowance.⁵⁶ Deductions from gross income in confiscation cases, otherwise proper, which were not claimed in the trial court, may not be claimed for the first time upon appeal.⁵⁷

⁴⁹ *Norris v. Alabama* (1935) 294 U. S. 587, 79 L. Ed. 1074, 55 S. Ct. 579; *Hollins v. Oklahoma* (1935) 295 U. S. 394, 79 L. Ed. 1500, 55 S. Ct. 784.

⁵⁰ *Baltimore & O. R. Co. v. United States* (1936) 298 U. S. 349, 80 L. Ed. 1209, 56 S. Ct. 797.

⁵¹ *United Railways & Electric Co. v. West* (1930) 280 U. S. 234, 74 L. Ed. 390, 50 S. Ct. 123.

⁵² *Home Telephone & Telegraph Co. v. Kuykendall* (1924) 265 U. S. 206, 68 L. Ed. 982, 44 S. Ct. 557.

⁵³ See § 639.

⁵⁴ *Adams v. Mills* (1932) 286 U. S. 397, 76 L. Ed. 1184, 52 S. Ct. 589; *Kansas City Southern R. Co. v. United States* (1931) 282 U. S. 760, 75 L. Ed. 684, 51 S. Ct. 304.

⁵⁵ *United Railways & Electric Co. v. West* (1930) 280 U. S. 234, 74 L. Ed. 390, 50 S. Ct. 123.

⁵⁶ *United Railways & Electric Co. v. West* (1930) 280 U. S. 234, 74 L. Ed. 390, 50 S. Ct. 123.

⁵⁷ See § 373.

But an appellee need not cross appeal from a favorable decree sustaining an administrative order, in order to present his contention respecting the mode of computing a depreciation allowance, which was made and rejected below, on the general issue of confiscation raised by the appeal.⁵⁸

§ 809. Reversal and Remand by Supreme Court.

Where the lower court is in error in granting a temporary injunction, but the complaint raises constitutional questions of due process, equal protection, violation of the obligation of contract and whether a state statute has ever been put into operation according to its terms, the record does not warrant a judgment of dismissal. The case will be reversed by the Supreme Court and remanded for further hearing and action.⁵⁹

An appellate court may reverse and remand a case involving judicial review to the lower court for a new trial of judicial issues involved.⁶⁰

§ 810. Second Appeal as One Remedy for Failure to Carry Out Mandate of First.

When a lower federal court refuses to give effect to or misconstrues the mandate of the Supreme Court, its action may be controlled by that court either upon a new appeal or by writ of mandamus.⁶¹ Such a new appeal rests upon the same foundation as did the first.⁶² It is well understood that the Supreme Court has the power to do all that is necessary to give effect to its judgments.⁶³

II. MODES OF APPEAL

§ 811. Appeals from District Courts.

The statutory basis for direct appeals from federal district courts to the United States Supreme Court is recapitulated in section 345 of

⁵⁸ United Railways & Electric Co. v. West (1930) 280 U. S. 234, 74 L. Ed. 390, 50 S. Ct. 123.

⁵⁹ Mayo v. Lakeland Highlands Canning Co. (1940) 309 U. S. 310, 84 L. Ed. 774, 60 S. Ct. 517.

⁶⁰ Railroad Commission v. Cumberland Telephone & Telegraph Co. (1909) 212 U. S. 414, 53 L. Ed. 577, 29 S. Ct. 357.

⁶¹ Baltimore & O. R. Co. v. United States (1929) 279 U. S. 781, 73 L. Ed. 954, 49 S. Ct. 492.

⁶² Baltimore & O. R. Co. v. United States (1924) 279 U. S. 781, 73 L. Ed. 954, 49 S. Ct. 492.

⁶³ Baltimore & O. R. Co. v. United States (1929) 279 U. S. 781, 73 L. Ed. 954, 49 S. Ct. 492.

Title 28 of the United States Code.⁶⁴ The method of taking such appeals is set forth in Rule 72 of the Federal Rules of Civil Procedure.⁶⁵

§ 812. — Under the Urgent Deficiencies Act.

In suits under the Urgent Deficiencies Act⁶⁶ a decree by a three-judge district court convened pursuant to the Act may be appealed directly to the United States Supreme Court,⁶⁷ even if the suit seeks an injunction under separate provisions of law in addition to the relief provided by the Act.⁶⁸ But, where grounds for general equitable relief have been improperly joined in a bill in a suit under the Urgent Deficiencies Act, such grounds obviously give no right to direct appeal under the Act, since there is no right to bring suit under it.⁶⁹ Where the bill is properly dismissed, there being such lack of standing to

⁶⁴ 28 USCA, "§ 345. (Judicial Code, section 238, amended.) Appellate jurisdiction from decrees of United States district courts. A direct review by the Supreme Court of an interlocutory or final judgment or decree of a district court may be had where it is so provided in the following sections or parts of sections and not otherwise:

"(1) Section 29 of Title 15, and section 45 of Title 49.

"(2) Section 682 of Title 18, where the decision of the district court is adverse to the United States.

"(3) Section 380 of this title.

"(4) So much of sections 47 and 47a of this title as relates to the review of interlocutory and final judgments and decrees in suits to enforce, suspend, or set aside orders of the Interstate Commerce Commission other than for the payment of money.

"(5) Section 217 of Title 7. (Mar. 3, 1911, c. 231, § 238, 36 Stat. 1157; Jan. 28, 1915, c. 22, § 2, 38 Stat. 804; Feb. 13, 1925, c. 229, § 1, 43 Stat. 938.)"

⁶⁵ Rule 72 of the Federal Rules of Civil Procedure:

"Rule 72. Appeal from a District Court to the Supreme Court

"When an appeal is permitted by law from a district court to the Supreme Court of the United States, an appeal shall be taken by petition for appeal accompanied by an assignment of errors. The appeal shall be allowed, a citation issued, a jurisdictional statement filed, a bond on appeal and supersedeas bond taken, and the record on appeal made and certified as prescribed by law and the Rules of the Supreme Court of the United States governing such an appeal."

⁶⁶ 28 USCA 43 et seq. See also § 633 et seq.

⁶⁷ 28 USCA 47. *Morgan v. United States* (1936) 298 U. S. 468, 80 L. Ed. 1288, 56 S. Ct. 906; *Valvoline Oil Co. v. United States* (1939) 308 U. S. 141, 84 L. Ed. 151, 60 S. Ct. 160; *St. Joseph Stock Yards Co. v. United States* (1936) 298 U. S. 38, 80 L. Ed. 1033, 56 S. Ct. 720.

⁶⁸ *United States v. Idaho* (1936) 298 U. S. 105, 80 L. Ed. 1070, 56 S. Ct. 690.

⁶⁹ *Pittsburgh & W. Va. R. Co. v. United States* (1930) 281 U. S. 479, 74 L. Ed. 980, 50 S. Ct. 378.

sue, and the Supreme Court affirms, this is without prejudice to the right, if any, to sue for an injunction in a proper proceeding.⁷⁰

The Circuit Courts of Appeals have no jurisdiction to entertain an appeal from an order or decree of the special three-judge district court.⁷¹

§ 813. — United States Not a Necessary Party on Appeal.

Although the United States is a necessary party under the Urgent Deficiencies Act in the district court,⁷² it is not a necessary party to an appeal by the Interstate Commerce Commission or other appropriate intervening defendant who is a party to the lower court decree.⁷³ On such an appeal the court has power to enforce the rights of the United States.⁷⁴

§ 814. — Denial of Application for Restitution Appealable.

Where a district court dismisses a bill to set aside an order of the Interstate Commerce Commission requiring the absorption of transfer charges for want of equity, and the Supreme Court reverses and remands the cause for further proceedings in accordance with its opinion, whereupon the appellant carriers make application for restitution of the sums absorbed under compulsion of the erroneous district court decree, and for reference to a master to ascertain the amounts, a decree of the district court denying this application is appealable to the Supreme Court under the Urgent Deficiencies Act.⁷⁵ An application for restitution is in effect an equity proceeding resulting in a final decree.⁷⁶ The appeal of a second decree in such a case rests upon the same foundation as did the appeal of the first.⁷⁷

§ 815. — Under Section 266, Judicial Code.

A direct appeal lies to the Supreme Court from a decree of a three-judge court convened pursuant to section 266 of the Judicial Code,⁷⁸

⁷⁰ *Pittsburgh & W. Va. R. Co. v. United States* (1930) 281 U. S. 479, 74 L. Ed. 980, 50 S. Ct. 378.

⁷¹ *Baltimore & O. R. Co. v. United States* (C. C. A. 3d, 1937) 87 F. (2d) 605.

⁷² See § 633.

⁷³ *Interstate Commerce Commission v. Oregon-Washington R. & Nav. Co.* (1933) 288 U. S. 14, 77 L. Ed. 588, 53 S. Ct. 266.

⁷⁴ *Interstate Commerce Commission v. Oregon-Washington R. & Nav. Co.*

(1933) 288 U. S. 14, 77 L. Ed. 588, 53 S. Ct. 266.

⁷⁵ *Baltimore & O. R. Co. v. United States* (1929) 279 U. S. 781, 73 L. Ed. 954, 49 S. Ct. 492.

⁷⁶ *Baltimore & O. R. Co. v. United States* (1929) 279 U. S. 781, 73 L. Ed. 954, 49 S. Ct. 492.

⁷⁷ *Baltimore & O. R. Co. v. United States* (1929) 279 U. S. 781, 73 L. Ed. 954, 49 S. Ct. 492.

⁷⁸ 28 USCA 330. See § 672 et seq.

granting⁷⁹ or denying⁸⁰ a permanent injunction in cases where an application for an interlocutory injunction has been pressed to a hearing.⁸¹ There is no right of direct appeal where an application for an interlocutory injunction was not pressed and the case was decided by a single judge.⁸² Today, cases under section 266 are the only instances of direct appeal to the Supreme Court on constitutional grounds where state administrative action is involved.⁸³

The jurisdiction of the Supreme Court upon direct appeal depends upon the same circumstances which determine the jurisdiction of the three-judge district court.⁸⁴ Thus in determining whether it has jurisdiction to hear the merits of such an appeal the Supreme Court should decide whether the district court's jurisdiction was properly invoked.⁸⁵ There is no right of direct appeal from a supplemental order of injunction, made to protect the court's jurisdiction already acquired and exercised under section 266, when that order involves no attack on the state statute or order as unconstitutional. The protection of the lower court's jurisdiction is not limited by section 266.⁸⁶

Upon appeal from a decree granting or refusing an interlocutory injunction under Judicial Code section 266, the argument should be restricted to the question whether, upon proper findings and conclusions, the lower court abused its discretion in granting or refusing an injunction. The parties should not argue constitutional questions.⁸⁷

In exercising its appellate jurisdiction the Supreme Court may give directions appropriate to the enforcement of the limitations of section

⁷⁹ *Driscoll v. Edison Light & Power Co.* (1939) 307 U. S. 104, 83 L. Ed. 1134, 59 S. Ct. 715, rehearing denied 307 U. S. 650, 83 L. Ed. 1529, 59 S. Ct. 831; *State Corporation Commission v. Wichita Gas Co.* (1933) 290 U. S. 561, 78 L. Ed. 500, 54 S. Ct. 321.

⁸⁰ *Central Kentucky Natural Gas Co. v. Railroad Commission* (1933) 290 U. S. 264, 78 L. Ed. 307, 54 S. Ct. 154.

⁸¹ See *Smith v. Wilson* (1927) 273 U. S. 388, 71 L. Ed. 699, 47 S. Ct. 385; *Ex parte Buder* (1926) 271 U. S. 461, 70 L. Ed. 1036, 46 S. Ct. 557.

⁸² *Smith v. Wilson* (1927) 273 U. S. 388, 71 L. Ed. 699, 47 S. Ct. 385; *Moore v. Fidelity & Deposit Co.*

(1926) 272 U. S. 317, 71 L. Ed. 273, 47 S. Ct. 105; *Grigsby v. Harris* (D. C. S. D. Tex., 1928) 27 F. (2d) 945. See *Brucker v. Fisher* (C. C. A. 6th, 1931) 49 F. (2d) 759.

⁸³ *Ex parte Buder* (1926) 271 U. S. 461, 70 L. Ed. 1036, 46 S. Ct. 557.

⁸⁴ *Oklahoma Gas & Electric Co. v. Oklahoma Packing Co.* (1934) 292 U. S. 386, 78 L. Ed. 1318, 54 S. Ct. 732.

⁸⁵ See *Smith v. Wilson* (1927) 273 U. S. 388, 71 L. Ed. 699, 47 S. Ct. 385.

⁸⁶ *Looney v. Eastern Texas R. Co.* (1918) 247 U. S. 214, 62 L. Ed. 1084, 38 S. Ct. 460.

⁸⁷ *Mayo v. Lakeland Highlands Canning Co.* (1940) 309 U. S. 310, 84 L. Ed. 774, 60 S. Ct. 517.

266, conform procedure to its requirements, and save to the appellants their proper remedies.⁸⁸ A decree denying a preliminary injunction or dismissing a suit on the sole ground that the requisite jurisdictional amount is not involved is reviewable in the Supreme Court.⁸⁹

A decree taxing as costs premiums for surety bonds substituted for impounded funds is one of the exceptions to the rule forbidding appeals from decrees for costs only. It has all the characteristics of finality and is appealable under section 266.⁹⁰

The jurisdiction on direct appeal is not destroyed because the court is able to decide the case without passing on the constitutional questions, and does so,⁹¹ as where it declares a state agency's order invalid merely because unauthorized by state statute.⁹²

§ 816. — Reasonable Mistake: Rights Saved.

If, reasonably mistaking the scope of section 266, an appellant goes directly to the Supreme Court, in dismissing that appeal the court will save his ordinary right of appeal independently of section 266.⁹³ Rights of litigants have similarly been saved where a mistaken appeal has been taken under the Act of August 24, 1937,⁹⁴ relating to review of the constitutionality of federal statutes.⁹⁵

§ 817. Appeals from Circuit Courts of Appeal.

Some administrative schemes provide for enforcement or annulment of administrative orders by petition in an appropriate Circuit Court of Appeals or the Court of Appeals for the District of Columbia.⁹⁶ Appellate review by the Supreme Court may ordinarily be invoked only by petition for certiorari.⁹⁷ The method of taking an appeal

⁸⁸ Oklahoma Gas & Electric Co. v. Oklahoma Packing Co. (1934) 292 U. S. 386, 78 L. Ed. 1318, 54 S. Ct. 732.

⁸⁹ Western & A. R. Co. v. Railroad Commission (1923) 261 U. S. 264, 67 L. Ed. 645, 43 S. Ct. 252; North Pacific S. S. Co. v. Soley (1921) 257 U. S. 216, 66 L. Ed. 203, 42 S. Ct. 87.

⁹⁰ Newton v. Consolidated Gas Co. (1924) 265 U. S. 78, 68 L. Ed. 909, 44 S. Ct. 481.

⁹¹ Herkness v. Irion (1928) 278 U. S. 92, 73 L. Ed. 198, 49 S. Ct. 40; Brucker v. Fisher (C. C. A. 6th, 1931) 49 F. (2d) 759.

⁹² Herkness v. Irion (1928) 278 U. S. 92, 73 L. Ed. 198, 49 S. Ct. 40.

⁹³ Roriek v. Everglades Drainage Dist. (1939) 307 U. S. 208, 83 L. Ed. 1242, 59 S. Ct. 808; Oklahoma Gas & Electric Co. v. Oklahoma Packing Co., (1934) 292 U. S. 386, 78 L. Ed. 1318, 54 S. Ct. 732.

⁹⁴ 28 USCA 380a.

⁹⁵ William Jameson & Co. v. Morgenthau (1939) 307 U. S. 171, 83 L. Ed. 1189, 59 S. Ct. 804.

⁹⁶ See the statutes collected in Appendix A, §§ 831-860.

⁹⁷ 28 USCA, "§ 347. (Judicial Code, section 240, amended.) Certiorari to circuit courts of appeals and United States Court of Appeals for District of Columbia; appeal to Su-

from a district court to a Circuit Court of Appeals is set forth in Rule 73 of the Federal Rules of Civil Procedure.⁹⁸

preme Court from circuit courts of appeals in certain cases; other reviews not allowed (a) In any case, civil or criminal, in a circuit court of appeals, or in the United States Court of Appeals for the District of Columbia, it shall be competent for the Supreme Court of the United States, upon the petition of any party thereto, whether Government or other litigant, to require by certiorari, either before or after a judgment or decree by such lower court, that the cause be certified to the Supreme Court for determination by it with the same power and authority, and with like effect, as if the cause had been brought there by unrestricted [writ of error or]† appeal.

“(b) Any case in a circuit court of appeals where is drawn in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is against its validity, may, at the election of the party relying on such State statute, be taken to the Supreme Court for review on [writ of error or]† appeal; but in that event a review on certiorari shall not be allowed at the instance of such party, and the review on such [writ of error or]† appeal shall be restricted to an examination and decision of the Federal questions presented in the case.

† Per annotation by Editors of USCA, the words “writ of error or” should be omitted.

“(c) No judgment or decree of a circuit court of appeals or of the United States Court of Appeals for the District of Columbia shall be subject to review by the Supreme Court otherwise than as provided in

this section. (Mar. 3, 1891, c. 517, § 6, 26 Stat. 828; Mar. 3, 1911, c. 231, § 240, 36 Stat. 1157; Feb. 13, 1925, c. 229, § 1, 43 Stat. 938; Jan. 31, 1928, c. 14, § 1, 45 Stat. 54; June 7, 1934, c. 426, 48 Stat. 926.)”

See the statutes collected in Appendix A, §§ 831-860.

⁹⁸ Rule 73 (a) (b) of the Federal Rules of Civil Procedure:

“Rule 73. Appeal to a Circuit Court of Appeals

“(a) How Taken. When an appeal is permitted by law from a district court to a circuit court of appeals and within the time prescribed, a party may appeal from a judgment by filing with the district court a notice of appeal. Failure of the appellant to take any of the further steps to secure the review of the judgment appealed from does not affect the validity of the appeal, but is ground only for such remedies as are specified in this rule or, when no remedy is specified, for such action as the appellate court deems appropriate, which may include dismissal of the appeal.

“(b) Notice of Appeal. The notice of appeal shall specify the parties taking the appeal; shall designate the judgment or part thereof appealed from; and shall name the court to which the appeal is taken. Notification of the filing of the notice of appeal shall be given by the clerk by mailing copies thereof to all the parties to the judgment other than the party or parties taking the appeal, but his failure so to do does not affect the validity of the appeal. The notification to a party shall be given by mailing a copy of the notice of appeal to his attorney of record or, if the party is not represented by

§ 818. To United States Supreme Court from State Courts.

Appeal on federal questions lies to the Supreme Court of the United States from a "final judgment" of the highest state court in which decision was permitted, including judgments or decrees in suits judicially reviewing an order of a state administrative agency,⁹⁹ and review may also be had upon certiorari.¹ This is true even though

an attorney, then to the party at his last known address, and such notification is sufficient notwithstanding the death of the party or of his attorney prior to the giving of the notification. The clerk shall note in the civil docket the names of the parties to whom he mails the copies, with date of mailing."

99 Northern Pac. R. Co. v. Department of Public Works (1925) 268 U. S. 39, 69 L. Ed. 837, 45 S. Ct. 412.

128 USCA, "§ 344. (*Judicial Code, section 237, amended.*) *Appellate jurisdiction of decrees of State courts; certiorari* (a) A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of the United States, and the decision is against its validity; or where is drawn in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a [writ of error]†. The writ † shall have the same effect as if the judgment or decree had been rendered or passed in a court of the United States. The Supreme Court may reverse, modify, or affirm the judgment or decree of such State court, and may, in its discretion, award execution or remand the cause to the court from which it was removed by the writ.†

"(b) It shall be competent for the

Supreme Court, by certiorari, to require that there be certified to it for review and determination, with the same power and authority and with like effect as if brought up by [writ of error,]† any cause wherein a final judgment or decree has been rendered or passed by the highest court of a State in which a decision could be had where is drawn in question the validity of a treaty or statute of the United States; or where is drawn in question the validity of a statute of any State on the ground of its being repugnant to the Constitution, treaties, or laws of the United States; or where any title, right, privilege, or immunity is specially set up or claimed by either party under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States; and the power to review under this paragraph may be exercised as well where the Federal claim is sustained as where it is denied. Nothing in this paragraph shall be construed to limit or detract from the right to a review on a [writ of error]† in a case where such a right is conferred by the preceding paragraph; nor shall the fact that a review on a [writ of error]† might be obtained under the preceding paragraph be an obstacle to granting a review on certiorari under this paragraph.

† Per annotation by Editors of USCA, "appeal" should be substituted for "writ of error" throughout the section.

the highest state court in which decision is permitted is an inferior court such as a justice court.² Thus when the highest court of a state refuses to allow an appeal from a decision of a lower court of the state, an appeal to the United States Supreme Court lies from the judgment of the lower court, it being the highest state court in which review has been permitted.³ Likewise, certiorari is properly directed to a lower court which enters judgment in accordance with the re-script of a higher court, where the judgment of the lower court, under local practice, is a final decision of the highest court in the state in which the decision could be had.⁴ A judgment of the highest state court is not "final," to be the basis of appeal, where it remands the case to an administrative agency for redetermination of an administrative question.⁵

§ 819. — When Federal Question Is Present.

The commonest federal questions raised on appeal from a state court are confiscation and denial of equal protection of the laws. An allegation of denial of due process under the Fourteenth Amendment, alone presents no federal question, where the state court has held that a finding of violation of state law with respect to local affairs, by a

"(c) If a [writ of error]† be improvidently sought and allowed under this section in a case where the proper mode of invoking a review is by a petition for certiorari, this alone shall not be a ground for dismissal; but the papers whereon the [writ of error]† was allowed shall be regarded and acted on as a petition for certiorari and as if duly presented to the Supreme Court at the time they were presented to the court or judge by whom the [writ of error]† was allowed: *Provided*, That where in such a case there appears to be no reasonable ground for granting a petition for certiorari it shall be competent for the Supreme Court to adjudge to the respondent reasonable damages for his delay, and single or double costs, as provided in section 878 of this title. (R. S. §§ 690, 709; Mar. 3, 1911, c. 231, §§ 236, 237, 36

Stat. 1156; Dec. 23, 1914, c. 2, 38 Stat. 790; Sept. 6, 1916, c. 448, § 2, 39 Stat. 726; Feb. 17, 1922, c. 54, 42 Stat. 366; Feb. 13, 1925, c. 229, § 1, 43 Stat. 937; Jan. 31, 1928, c. 14, § 1, 45 Stat. 54.)"

† Per annotation by Editors of USCA, "appeal" should be substituted for "writ of error" throughout the section.

² *Grovey v. Townsend* (1935) 295 U. S. 45, 79 L. Ed. 1292, 55 S. Ct. 622, 97 A. L. R. 680.

³ *Bell Telephone Co. v. Pennsylvania Public Utility Commission* (1940) 309 U. S. 30, 84 L. Ed. 563, 60 S. Ct. 411.

⁴ *Central New England R. Co. v. Boston & A. R. Co.* (1929) 279 U. S. 415, 73 L. Ed. 770, 49 S. Ct. 358.

⁵ *Laclede Gaslight Co. v. Public Service Commission* (1938) 304 U. S. 398, 82 L. Ed. 1422, 58 S. Ct. 988.

state agency, is supported by evidence.⁶ Thus, where a utility attacks a state rate order reducing intrastate rates to the interstate level, as denying due process but does not allege confiscation or other constitutional objection beyond denial of due process, an appeal from the state court's judgment that the agency's finding of discrimination was supported by evidence will be dismissed by the Supreme Court.⁷

§ 820. — Where State Court Review Is Legislative.

Where the highest state court in which review can be had not only decides judicial questions, but determines administrative ones, which are legislative in character,⁸ appeal lies to the Supreme Court on Federal questions raised in the judicial part of the review.⁹ No appeal lies to the Supreme Court of the United States from a judgment of a state court in a suit reviewing administrative action where the review is purely legislative in character.¹⁰ Where it cannot be determined that a state court passed upon the controversy in a judicial capacity, no federal question was necessary to the decision of the state court, and the United States Supreme Court has no jurisdiction.¹¹ While action of a state court on an administrative agency's order is ordinarily judicial, the Oklahoma Constitution, Article IX, section 23,¹² provides that the Oklahoma Supreme Court may make any order which the Corporation Commission could have made, and that such shall be substituted for the Commission's order. The Oklahoma Supreme Court has recently decided that, in certain cases, its review, formerly regarded as legislative, is now judicial. However, decisions in such cases made before the date of change are still regarded as legislative by the State Supreme Court. Hence they cannot be *res*

⁶ Bell Telephone Co. v. Pennsylvania Public Utility Commission (1940) 309 U. S. 30, 84 L. Ed. 563, 60 S. Ct. 411.

⁷ Bell Telephone Co. v. Pennsylvania Public Utility Commission (1940) 309 U. S. 30, 84 L. Ed. 563, 60 S. Ct. 411.

⁸ E. g., the Pennsylvania Superior Court, Amendment of June 12, 1931, P. L. 530, § 1; 66 P. S. § 836.

⁹ Clark's Ferry Bridge Co. v. Public Service Commission (1934) 291 U. S. 227, 78 L. Ed. 767, 54 S. Ct. 427.

¹⁰ Southwestern Bell Telephone Co. v. Oklahoma (1938) 303 U. S. 206, 82 L. Ed. 751, 58 S. Ct. 528. See Oklahoma Packing Co. v. Oklahoma Gas & Electric Co. (1940) 309 U. S. 4, 84 L. Ed. 537, 60 S. Ct. 215, rehearings denied 308 U. S. 530, 84 L. Ed. 447, 60 S. Ct. 215, 309 U. S. 693, 84 L. Ed. 1034, 60 S. Ct. 465.

¹¹ Southwestern Bell Telephone Co. v. Oklahoma (1938) 303 U. S. 206, 82 L. Ed. 751, 58 S. Ct. 528.

¹² Article IX, § 23.

judicata in later cases. This view is binding on the Supreme Court of the United States.¹³

§ 821. — Appeal and Certiorari.

A judgment of a state court sustaining the validity of a regulatory order of a state administrative agency is reviewable in the Supreme Court of the United States upon writ of error (now appeal), while a judgment of a state court sustaining a tax alleged to be illegal because of discrimination in assessing property can be reviewed only on certiorari.¹⁴ This is because, for the purpose of jurisdiction in federal courts the difference between the function of regulating, expressed by administrative order, and the function of fact finding, is vital. Regulatory administrative orders constitute action, but findings of fact form merely a basis for action. From this difference between action and basis for action flows the difference in the method of judicial review.¹⁵

§ 822. No Direct Appeal from State Agency.

The Supreme Court has no jurisdiction of a direct appeal from a state administrative agency, so that a writ of error directed not to a court but to a state administrative agency will be dismissed for lack of jurisdiction.¹⁶

¹³ *Oklahoma Packing Co. v. Oklahoma Gas & Electric Co.* (1940) 309 U. S. 4, 84 L. Ed. 537, 60 S. Ct. 215, rehearings denied 308 U. S. 530, 84 L. Ed. 447, 60 S. Ct. 215, 309 U. S. 693, 84 L. Ed. 1034, 60 S. Ct. 465.

¹⁴ *Ex parte Williams* (1928) 277 U.

S. 267, 72 L. Ed. 877, 48 S. Ct. 523.

¹⁵ *Ex parte Williams* (1928) 277 U.

S. 267, 72 L. Ed. 877, 48 S. Ct. 523.

¹⁶ *Staten Island Rapid Transit R.*

Co. v. Transit Commission (1928)

276 U. S. 603, 72 L. Ed. 726, 48 S.

Ct. 338.

CHAPTER 47

CONTEMPT PROCEEDINGS

§ 823. In General.

The decree of a court enforcing an administrative order is enforceable by contempt proceedings.¹ In such cases the contempt is civil, not criminal.² A decree enforcing an order which is unclear or self-contradictory cannot be enforced in contempt proceedings, as the court cannot by construction or otherwise rewrite the order to cure its ambiguity.³ Contempt proceedings may be brought to enforce judicial decrees only, not statutes. Thus, entry of a decree of affirmance by the court in a proceeding instituted to review and set aside a Federal Trade Commission order being not in legal effect an enforcement decree embodying the provisions of the Commission's order and enjoining any violation is not enforceable in contempt proceedings.⁴ However, an order or part of one, not properly supported, should not be incorporated in the court's decree of enforcement even though, being in general terms, it adds nothing to statutory duties, because as an order it would be enforceable in contempt proceedings.⁵

An injunction against enforcing a prescribed scale of rates which as a whole appears confiscatory, does not prohibit, but rather contemplates another rate investigation and another scale of rates, and when the new schedule differs substantially from the old, ameliorating it, no sufficient cause for adjudging the agency in contempt is shown.⁶

¹ National Labor Relations Board v. Hopwood Retinning Co. (C. C. A. 2d, 1939) 104 F. (2d) 302; National Labor Relations Board v. Carlisle Lumber Co. (C. C. A. 9th, 1939) 108 F. (2d) 188.

See note, "The Scope of National Labor Relations Board Cease and Desist Orders: Contempt Proceedings Against the Employer," (1940) 53 Harv. L. Rev. 472.

² National Labor Relations Board v. Hopwood Retinning Co. (C. C. A. 2d, 1939) 104 F. (2d) 302.

³ National Labor Relations Board v. Bell Oil & Gas Co. (C. C. A. 5th, 1938) 99 F. (2d) 56.

⁴ Federal Trade Commission v. Fairyfoot Products Co. (C. C. A. 7th, 1938) 94 F. (2d) 844.

⁵ National Labor Relations Board v. Remington Rand, Inc. (C. C. A. 2d, 1938) 94 F. (2d) 862.

⁶ Georgia Continental Telephone Co. v. Georgia Public Service Commission (D. C. N. D. Ga., 1934) 8 F. Supp. 434.

§ 824. Contempt Proceedings by Private Parties.

A labor union has no standing to press a charge of civil contempt, for violation of a decree enforcing an order of the National Labor Relations Board.⁷ This is true even if the union filed charges before the Board, upon which the Board issued its complaint and held the hearing resulting in the order in question, and was permitted to intervene in proceedings before the Circuit Court of Appeals, and was heard in the certiorari proceedings in the Supreme Court.⁸ By the express terms of the Act⁹ the Board is made the exclusive agency for the purpose of ascertaining and preventing unfair labor practices.¹⁰ The Act does not create the right of self-organization or of collective bargaining through representatives of the employees' own choosing. No private right of action is contemplated. The right of self-organization is a fundamental one, long ago recognized.¹¹ The opportunity given to private persons is to contest, not to enforce, a final order of the Board.¹² Like the Federal Trade Commission Act¹³ and unlike the Interstate Commerce Act¹⁴ the National Labor Relations Act does not provide private persons with an administrative remedy for private wrongs.¹⁵ Decisions dealing with the legal obligations arising under the Railway Labor Act¹⁶ cannot be regarded as apposite.¹⁷

⁷ *Amalgamated Utility Workers v. Consolidated Edison Co.* (1940) 309 U. S. 261, 84 L. Ed. 738, 60 S. Ct. 561.

⁸ *Amalgamated Utility Workers v. Consolidated Edison Co.* (1940) 309 U. S. 261, 84 L. Ed. 738, 60 S. Ct. 561.

⁹ 29 USCA 160 (a).

¹⁰ *Amalgamated Utility Workers v. Consolidated Edison Co.* (1940) 309 U. S. 261, 84 L. Ed. 738, 60 S. Ct. 561.

¹¹ *Amalgamated Utility Workers v. Consolidated Edison Co.* (1940) 309 U. S. 261, 84 L. Ed. 738, 60 S. Ct. 561.

¹² *Amalgamated Utility Workers v. Consolidated Edison Co.* (1940) 309 U. S. 261, 84 L. Ed. 738, 60 S. Ct. 561.

¹³ 15 USCA 41 et seq.

¹⁴ 49 USCA 1 et seq.

¹⁵ *Amalgamated Utility Workers v. Consolidated Edison Co.* (1940) 309 U. S. 261, 84 L. Ed. 738, 60 S. Ct. 561.

¹⁶ 45 USCA 151.

¹⁷ *Amalgamated Utility Workers v. Consolidated Edison Co.* (1940) 309 U. S. 261, 84 L. Ed. 738, 60 S. Ct. 561.

BOOK IV

SUITS BY AND AGAINST ADMINISTRATIVE AGENCIES AND THEIR OFFICERS

CHAPTER 48

SUITS BY ADMINISTRATIVE AGENCIES

§ 825. In General.

Some statutes expressly confer power upon administrative agencies to sue in the courts for enforcement of their own orders or determinations,¹ or to enforce the statute by independent suit.² The latter type of statute does not involve administrative action or principles of administrative law. Both questions of fact and questions of law are determined in the judicial proceeding. Thus the fact that an administrative agency is a party to litigation does not necessarily mean that administrative law matters are involved. For instance, the Securities and Exchange Commission may seek to enforce the Public Utility Holding Company Act's provisions for registration³ by suit in a United States District Court.⁴

1 Federal Trade Commission.

This was previously the case with the Federal Trade Commission, 38 Stat. 719 as amended by 43 Stat. 939, see 15 USCA former section 45, now superseded.

National Labor Relations Board.

29 USCA 160.

See *New York & Porto Rico S. S. Co. v. United States* (D. C. E. D. N. Y., 1940) 32 F. Supp. 538.

Secretary of Agriculture.

See *Packers and Stockyards Act*, 7 USCA 210 (f), 216.

United States Employees Compensation Commission.

33 USCA 918.

2 Civil Aeronautics Authority.

49 USCA 647.

Federal Power Commission.

The Natural Gas Act, 15 USCA 717s; 16 USCA 825m.

Federal Trade Commission.

15 USCA 53.

Securities and Exchange Commission.

15 USCA 77t, 78u, 79r(g), 79y, 80a-35, 80a-41(e), 80a-43. *Securities & Exchange Commission v. Robert Collier & Co.* (C. C. A. 2d, 1935) 76 F. (2d) 939.

3 15 USCA 79d, 79e, 79 r(f).

4 *Electric Bond & Share Co. v. Securities & Exchange Commission* (1938) 303 U. S. 419, 82 L. Ed. 936, 58 S. Ct. 678, 115 A. L. R. 105.

CHAPTER 49

SUITS AGAINST ADMINISTRATIVE AGENCIES

§ 826. Immunity Where Officer Acts Within Scope of Duty.

§ 827. When Act Is Within Scope of Officer's Duty.

§ 828. —Defamatory Statements.

§ 829. Suits for Damages for Administrative Discrimination.

§ 830. Suits Against Administrative Agencies.

§ 826. Immunity Where Officer Acts Within Scope of Duty.

There is a general rule that a ministerial officer who acts wrongfully, although in good faith, is nevertheless liable in a civil action, and cannot claim the immunity of the sovereign.¹ There is also a general rule that if any officer, ministerial or otherwise, acts outside the scope of his jurisdiction and without authorization of law he is liable in an action for damages for injuries suffered by a citizen as a result thereof.² Thus an administrative officer who performs an act directed by Congress which had no constitutional power to direct the act, is liable for consequent damages.³ And a sergeant at arms who imprisons a person pursuant to the direction of the House of Representatives which has found such person in contempt, is liable where the House had no constitutional power to punish for contempt.⁴ But if the act complained of was done within the scope of the officer's duties as defined by law, the policy of the law is that he shall not be subjected to the harassment of civil litigation or be liable for civil damages because of a mistake of fact occurring in the exercise of his

¹ *Cooper v. O'Connor* (1938) 69 App. D. C. 100, 108, 99 F. (2d) 135, 143, 118 A. L. R. 1440, cert. den. 305 U. S. 642, 643, 83 L. Ed. 414, 59 S. Ct. 146, rehearings denied (1938) 305 U. S. 673, 83 L. Ed. 436, 59 S. Ct. 241, 242, (1939) 307 U. S. 651, 83 L. Ed. 1529, 59 S. Ct. 1030, 1035. See *James-town Veneer & Plywood Corp. v. National Labor Relations Board* (D. C. W. D. N. Y., 1936) 13 F. Supp. 405.

See Edward S. Jennings in "Tort Liability of Administrative Officers," (1937) 21 Minn. L. Rev. 263.

² *Cooper v. O'Connor* (1938) 69 App. D. C. 100, 108, 99 F. (2d) 135, 143, 118 A. L. R. 1440, cert. den. 305 U. S. 642, 643, 83 L. Ed. 414, 59 S. Ct. 146, rehearings denied (1938) 305 U. S. 673, 83 L. Ed. 436, 59 S. Ct. 241, 242, (1939) 307 U. S. 651, 83 L. Ed. 1529, 59 S. Ct. 1030, 1035. See also § 710 et seq.

³ *Kilbourn v. Thompson* (1880) 103 U. S. 168, 26 L. Ed. 377.

⁴ *Kilbourn v. Thompson* (1880) 103 U. S. 168, 26 L. Ed. 377.

judgment or discretion,⁵ or because of an erroneous construction and application of law.⁶ It is now generally recognized that as applied to some officers even the absence of probable cause and the presence of arbitrariness, or malice or other bad motive, are not sufficient to impose liability upon such an officer who acts within the general scope of his authority.⁷ Thus, the head of an executive department of the United States government cannot be held in damages for acts done by him in relation to matters committed by law to his control or supervision,⁸ even though his error is describable as arbitrary, capricious and malicious.⁹ The rule is not limited in its application to the heads of departments. Under modern conditions, such officers must delegate many activities which require official immunity. When the act done occurs in the course of official duty of the person duly appointed and required to act, it is the official act of the department, and the same reason for immunity applies.¹⁰ The rule may be restated thus: where administrative officers are exercising a discretion with which they are

⁵ *Cooper v. O'Connor* (1938) 69 App. D. C. 100, 108, 99 F. (2d) 135, 143, 118 A. L. R. 1440, cert. den. 305 U. S. 642, 643, 83 L. Ed. 414, 59 S. Ct. 146, rehearings denied (1938) 305 U. S. 673, 83 L. Ed. 436, 59 S. Ct. 241, 242, (1939) 307 U. S. 651, 83 L. Ed. 1529, 59 S. Ct. 1030, 1035.

⁶ *Cooper v. O'Connor* (1938) 69 App. D. C. 100, 108, 99 F. (2d) 135, 143, 118 A. L. R. 1440, cert. den. 305 U. S. 642, 643, 83 L. Ed. 414, 59 S. Ct. 146, rehearings denied (1938) 305 U. S. 673, 83 L. Ed. 436, 59 S. Ct. 241, 242, (1939) 307 U. S. 651, 83 L. Ed. 1529, 59 S. Ct. 1030, 1035; *Standard Nut Margarine Co. v. Mellon* (1934) 63 App. D. C. 339, 72 F. (2d) 557 cert. den. 293 U. S. 605, 79 L. Ed. 696, 55 S. Ct. 124.

⁷ *Spalding v. Vilas* (1896) 161 U. S. 483, 40 L. Ed. 780, 16 S. Ct. 631; *Cooper v. O'Connor* (1938) 69 App. D. C. 100, 108, 99 F. (2d) 135, 143, 118 A. L. R. 1440, cert. den. 305 U. S. 642, 643, 83 L. Ed. 414, 59 S. Ct. 146, rehearings denied (1938) 305 U. S. 673, 83 L. Ed. 436, 59 S. Ct.

241, 242, (1939) 307 U. S. 651, 83 L. Ed. 1529, 59 S. Ct. 1030, 1035; *Standard Nut Margarine Co. v. Mellon* (1934) 63 App. D. C. 339, 72 F. (2d) 557, cert. den. 293 U. S. 605, 79 L. Ed. 696, 55 S. Ct. 124.

⁸ *Standard Nut Margarine Co. v. Mellon* (1934) 63 App. D. C. 339, 72 F. (2d) 557, cert. den. 293 U. S. 605, 79 L. Ed. 696, 55 S. Ct. 124.

⁹ *Spalding v. Vilas* (1896) 161 U. S. 483, 40 L. Ed. 780, 16 S. Ct. 631; *Standard Nut Margarine Co. v. Mellon* (1934) 63 App. D. C. 339, 72 F. (2d) 557, cert. den. 293 U. S. 605, 79 L. Ed. 696, 55 S. Ct. 124.

¹⁰ * *Cooper v. O'Connor* (1938) 69 App. D. C. 100, 108, 99 F. (2d) 135, 143, 118 A. L. R. 1440, cert. den. 305 U. S. 642, 643, 83 L. Ed. 414, 59 S. Ct. 146, rehearings denied (1938) 305 U. S. 673, 83 L. Ed. 436, 59 S. Ct. 241, 242, (1939) 307 U. S. 651, 83 L. Ed. 1529, 59 S. Ct. 1030, 1035; *United States to Use of Parravicino v. Brunswick* (1934) 63 App. D. C. 65, 69 F. (2d) 383.

vested by law, even though they have made a mistake, they are not liable to respond in damages.¹¹

§ 827. When Act Is Within Scope of Officer's Duty.

The question on which liability primarily depends in these cases is therefore whether the acts complained of came within the scope of the duties of the officers concerned.¹² Acts, to be within the scope of official duty, need not be specifically prescribed by statute, nor need they be specifically directed or requested by a superior officer.¹³ It is sufficient if they are done in relation to matters committed by law to the control or supervision of the acting officer.¹⁴ The immunity embraces every action which may properly constitute an aid in the enforcement of the law.¹⁵ Thus, a district attorney and his assistants may appear before a grand jury, prosecute, or enter a *nolle prosequi*,¹⁶ officers whose duty it is to investigate crime may appear before grand juries and may assist prosecutions,¹⁷ and an officer such as the Comptroller of the Currency, who is charged with the duty of supervising

¹¹ *Brown v. Rudolph* (1928) 58 App. D. C. 116, 25 F. (2d) 540, cert. den. 277 U. S. 605, 72 L. Ed. 1011, 48 S. Ct. 601.

¹² *Cooper v. O'Connor* (1938) 69 App. D. C. 100, 108, 99 F. (2d) 135, 143, 118 A. L. R. 1440, cert. den. 305 U. S. 642, 643, 83 L. Ed. 414, 59 S. Ct. 146, rehearings denied (1938) 305 U. S. 673, 83 L. Ed. 436, 59 S. Ct. 241, 242, (1939) 307 U. S. 651, 83 L. Ed. 1529, 59 S. Ct. 1030, 1035.

¹³ *Cooper v. O'Connor* (1938) 69 App. D. C. 100, 108, 99 F. (2d) 135, 143, 118 A. L. R. 1440, cert. den. 305 U. S. 642, 643, 83 L. Ed. 414, 59 S. Ct. 146, rehearings denied (1938) 305 U. S. 673, 83 L. Ed. 436, 59 S. Ct. 241, 242, (1939) 307 U. S. 651, 83 L. Ed. 1529, 59 S. Ct. 1030, 1035.

¹⁴ *Cooper v. O'Connor* (1938) 69 App. D. C. 100, 108, 99 F. (2d) 135, 143, 118 A. L. R. 1440, cert. den. 305 U. S. 642, 643, 83 L. Ed. 414, 59 S. Ct. 146, rehearings denied (1938) 305 U. S. 673, 83 L. Ed. 436, 59 S. Ct. 241, 242, (1939) 307 U. S. 651, 83 L. Ed. 1529, 59 S. Ct. 1030, 1035; *Stand-*

ard Nut Margarine Co. v. Mellon (1934) 63 App. D. C. 339, 72 F. (2d) 557, cert. den. 293 U. S. 605, 79 L. Ed. 696, 55 S. Ct. 124.

¹⁵ *Cooper v. O'Connor* (1938) 69 App. D. C. 100, 108, 99 F. (2d) 135, 143, 118 A. L. R. 1440, cert. den. 305 U. S. 642, 643, 83 L. Ed. 414, 59 S. Ct. 146, rehearings denied (1938) 305 U. S. 673, 83 L. Ed. 436, 59 S. Ct. 241, 242, (1939) 307 U. S. 651, 83 L. Ed. 1529, 59 S. Ct. 1030, 1035.

¹⁶ *Cooper v. O'Connor* (1938) 69 App. D. C. 100, 108, 99 F. (2d) 135, 143, 118 A. L. R. 1440, cert. den. 305 U. S. 642, 643, 83 L. Ed. 414, 59 S. Ct. 146, rehearings denied (1938) 305 U. S. 673, 83 L. Ed. 436, 59 S. Ct. 241, 242, (1939) 307 U. S. 651, 83 L. Ed. 1529, 59 S. Ct. 1030, 1035.

¹⁷ *Cooper v. O'Connor* (1938) 69 App. D. C. 100, 108, 99 F. (2d) 135, 143, 118 A. L. R. 1440, cert. den. 305 U. S. 642, 643, 83 L. Ed. 414, 59 S. Ct. 146, rehearings denied (1938) 305 U. S. 673, 83 L. Ed. 436, 59 S. Ct. 241, 242, (1939) 307 U. S. 651, 83 L. Ed. 1529, 59 S. Ct. 1030, 1035.

national banks, may assist the prosecution of persons whom his investigations indicate to have defrauded such banks.¹⁸ In such cases, courts may take judicial notice of the fact that defendants are governmental officials, and of the nature and scope of their official duties.¹⁹

§ 828. — Defamatory Statements.

Administrative agencies, exercising quasi-legislative and quasi-judicial powers, are arms of the government. They are invested with all the functions of authority which protect their members from liability for statements of a defamatory character, made in connection with the transaction of the agencies' business.²⁰ Whether there is protection in a given case depends upon whether the statement was made in the course of the agency's business. Where it is made at a hearing, or in a commissioner's office, in connection with a matter relating to the agency's business, the statement is protected.²¹ Thus it has been held that where the Tariff Commission had interested itself in a former employee's efforts to regain lost civil service status, a slanderous statement made to the former employee by a commissioner in his office, during an interview the purpose of which was to procure further action on the employee's behalf, is not actionable.²² This decision would, however, appear to go to the bounds of the rule.

Statements injurious to a party's commercial reputation, made by a consul in an official, confidential report to a superior, to be used for governmental purposes in a report, were privileged.²³

§ 829. Suits for Damages for Administrative Discrimination.

Suit may be brought, in a proper case, against an administrative officer for damages because of administrative discrimination²⁴ which

¹⁸ *Cooper v. O'Connor* (1938) 69 App. D. C. 100, 108, 99 F. (2d) 135, 143, 118 A. L. R. 1440, cert. den. 305 U. S. 642, 643, 83 L. Ed. 414, 59 S. Ct. 146, rehearings denied (1938) 305 U. S. 673, 83 L. Ed. 436, 59 S. Ct. 241, 242, (1939) 307 U. S. 651, 83 L. Ed. 1529, 59 S. Ct. 1030, 1035.

¹⁹ *Cooper v. O'Connor* (1938) 69 App. D. C. 100, 108, 99 F. (2d) 135, 143, 118 A. L. R. 1440, cert. den. 305 U. S. 642, 643, 83 L. Ed. 414, 59 S. Ct. 146, rehearings denied (1938) 305 U. S. 673, 83 L. Ed. 436, 59 S. Ct. 241, 242, (1939) 307 U. S. 651, 83

L. Ed. 1529, 59 S. Ct. 1030, 1035.

²⁰ *Smith v. O'Brien* (1937) 66 App. D. C. 387, 88 F. (2d) 769; *United States to Use of Parravicino v. Brunswick* (1934) 63 App. D. C. 65, 69 F. (2d) 383.

²¹ *Smith v. O'Brien* (1937) 66 App. D. C. 387, 88 F. (2d) 769.

²² *Smith v. O'Brien* (1937) 66 App. D. C. 387, 88 F. (2d) 769.

²³ *United States to Use of Parravicino v. Brunswick* (1934) 63 App. D. C. 65, 69 F. (2d) 383.

²⁴ See § 401 et seq.

deprived the plaintiff of his constitutional rights.²⁵ This provides a method of judicial review of administrative action as well as imposes personal liability on the administrative officers involved. Whether there is personal liability of the members of a state board of assessment, for discrimination under a state statute is not a federal question.²⁶

§ 830. Suits Against Administrative Agencies.

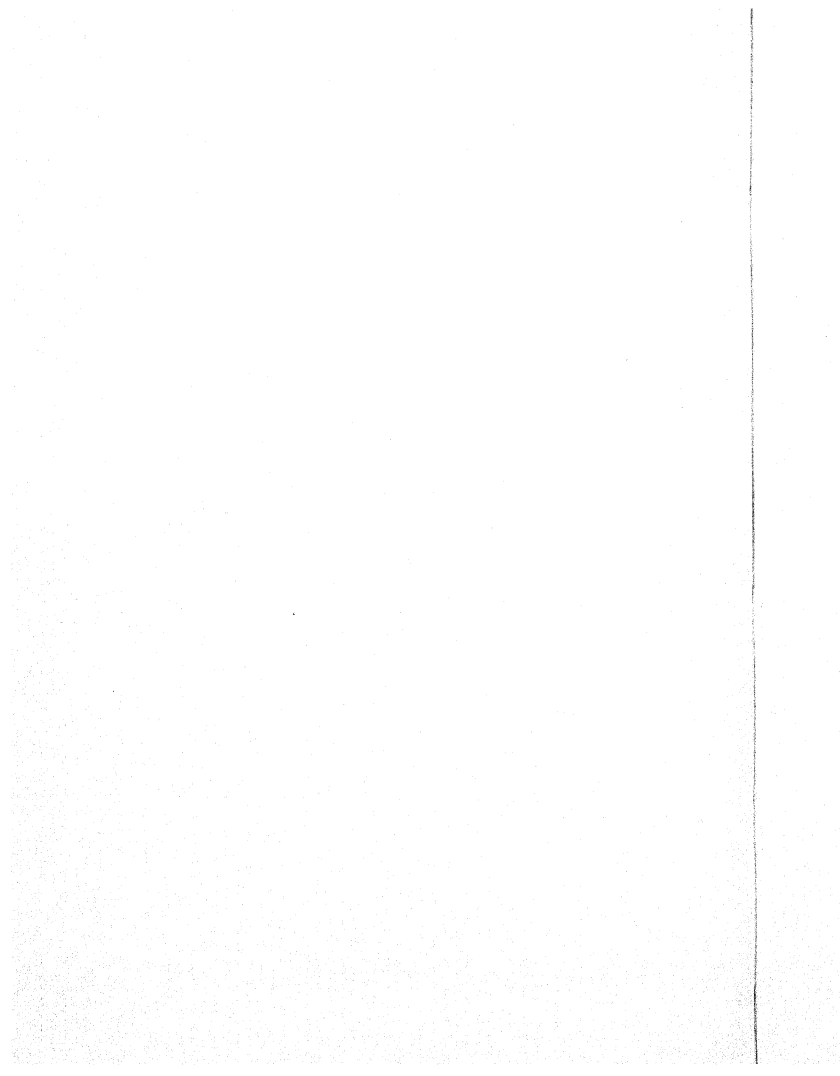
As the National Labor Relations Board is an administrative organ of the United States government it cannot be sued in tort without the consent of Congress.²⁷

²⁵ *Nixon v. Condon* (1932) 286 U. S. 73, 76 L. Ed. 984, 52 S. Ct. 484, 88 A. L. R. 458. See also § 710 et seq.
²⁶ *Williams v. Weaver* (1879) 100 U. S. 539, 25 L. Ed. 705.

²⁷ *Clover Fork Coal Co. v. National Labor Relations Board* (D. C. E. D. Ky., 1937) 30 F. Supp. 793, aff'd (C. A. 6th, 1939) 107 F. (2d) 1009.

APPENDIX A

STATUTES RELATING TO JUDICIAL REVIEW



APPENDIX A

STATUTES RELATING TO JUDICIAL REVIEW

- § 831. Administrator of the Wage and Hour Division.
- § 832. Board of Tax Appeals.
- § 833. Civil Aeronautics Authority.
- § 834. Under the Clayton Act.
- § 835. Commissioner of Internal Revenue.
- § 836. Commodity Exchange Commission.
- § 837. Court of Claims.
- § 838. Court of Customs and Patent Appeals.
- § 839. Federal Alcohol Administration.
- § 840. Federal Communications Commission.
- § 841. Federal Power Commission.
- § 842. Federal Reserve Board.
- § 843. Federal Trade Commission.
- § 844. Interstate Commerce Commission.
- § 845. National Labor Relations Board.
- § 846. National Mediation Board: Board of Arbitration.
- § 847. National Railroad Adjustment Board.
- § 848. Patent Office.
- § 849. Railroad Retirement Board.
- § 850. Secretary of Agriculture.
- § 851. Secretary of the Interior.
- § 852. Secretary of Labor.
- § 853. Secretary of War.
- § 854. Securities and Exchange Commission.
- § 855. Selective Service Boards.
- § 856. Social Security Board.
- § 857. United States Customs Court.
- § 858. United States Employees Compensation Commission: Deputy Commissioners.
- § 859. United States Maritime Commission.
- § 860. United States Tariff Commission.

§ 831. Administrator of the Wage and Hour Division.

The Fair Labor Standards Act of 1938

(29 USCA 210)

“§ 210. Court review.

“(a) Any person aggrieved by an order of the Administrator issued under section 208 may obtain a review of such order in the circuit court of

appeals of the United States for any circuit wherein such person resides or has his principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the entry of such order, a written petition praying that the order of the Administrator be modified or set aside in whole or in part. A copy of such petition shall forthwith be served upon the Administrator, and thereupon the Administrator shall certify and file in the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order in whole or in part, so far as it is applicable to the petitioner. The review by the court shall be limited to questions of law, and findings of fact by the Administrator when supported by substantial evidence shall be conclusive. No objection to the order of the Administrator shall be considered by the court unless such objection shall have been urged before the Administrator or unless there were reasonable grounds for failure so to do. If application is made to the court for leave to adduce additional evidence, and it is shown to the satisfaction of the court that such additional evidence may materially affect the result of the proceeding and that there were reasonable grounds for failure to adduce such evidence in the proceeding before the Administrator, the court may order such additional evidence to be taken before the Administrator and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Administrator may modify his findings by reason of the additional evidence so taken, and shall file with the court such modified or new findings which if supported by substantial evidence shall be conclusive, and shall also file his recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 346 and 347 of Title 28, as amended.

"(b) The commencement of proceedings under subsection (a) shall not, unless specifically ordered by the court, operate as a stay of the Administrator's order. The court shall not grant any stay of the order unless the person complaining of such order shall file in court an undertaking with a surety or sureties satisfactory to the court for the payment to the employees affected by the order, in the event such order is affirmed, of the amount by which the compensation such employees are entitled to receive under the order exceeds the compensation they actually receive while such stay is in effect. June 25, 1938, c. 676, § 10, 52 Stat. 1065."

§ 832. Board of Tax Appeals.

(26 USCA 1141 et seq.)

"§ 1141. Courts of review.

"(a) Jurisdiction. The Circuit Courts of Appeals and the United States Court of Appeals for the District of Columbia shall have exclusive jurisdiction to review the decisions of the Board, except as provided in section 239 of the Judicial Code, as amended, 43 Stat. 938 (U. S. C., Title 28, § 346); and the judgment of any such court shall be final, except that it shall be subject to review by the Supreme Court of the United States upon

certiorari, in the manner provided in section 240 of the Judicial Code, as amended, 43 Stat. 938 (U. S. C., Title 28, § 347).

"(b) Venue.

"(1) In general. Except as provided in paragraph 2, such decisions may be reviewed by the Circuit Court of Appeals for the circuit in which is located the collector's office to which was made the return of the tax in respect of which the liability arises or, if no return was made, then by the United States Court of Appeals for the District of Columbia.

"(2) By agreement. Notwithstanding the provisions of paragraph 1, such decisions may be reviewed by any circuit court of appeals, or the United States Court of Appeals for the District of Columbia, which may be designated by the Commissioner and the taxpayer by stipulation in writing.

"(3) Application of subsection. This subsection shall be applicable to all decisions of the Board rendered on and after May 10, 1934, and section 1002 of the Revenue Act of 1926, 44 Stat. 110, as in force prior to May 10, 1934, shall be applicable to such decisions rendered prior thereto, except that paragraph 2 of this subsection may be applied to any such decision rendered prior to May 10, 1934.

"(c) Powers.

"(1) To affirm, modify, or reverse. Upon such review, such courts shall have power to affirm or, if the decision of the Board is not in accordance with law, to modify or to reverse the decision of the Board, with or without remanding the case for a rehearing, as justice may require.

"(2) To make rules. Such courts are authorized to adopt rules for the filing of the petition for review, the preparation of the record for review, and the conduct of proceedings upon such review.

"(3) To require additional security. Nothing in section 1145 shall be construed as relieving the petitioner from making or filing such undertakings as the court may require as a condition of or in connection with the review.

"(4) To impose damages. The Circuit Court of Appeals, the United States Court of Appeals for the District of Columbia, and the Supreme Court shall have power to impose damages in any case where the decision of the Board is affirmed and it appears that the petition was filed merely for delay. 53 Stat. 164."

"§ 1142. Petition for review.

"The decision of the Board rendered after February 26, 1926 (except as provided in subdivision (j) of section 283 and in subdivision (h) of section 318 of the Revenue Act of 1926, 44 Stat. 65, 83, relating to hearings before the Board prior to February 26, 1926) may be reviewed by a Circuit Court of Appeals, or the United States Court of Appeals for the District of Columbia, as provided in section 1141, if a petition for such review is filed by either the Commissioner or the taxpayer within three months after the decision is rendered, or, in the case of a decision rendered on or before June 6, 1932, within six months after the decision is rendered. 53 Stat. 165."

"§ 1143. Change of Commissioner.

"When the incumbent of the office of Commissioner changes, no substitution of the name of his successor shall be required in proceedings pending

after May 10, 1934, before any appellate court reviewing the action of the Board. 53 Stat. 165."

(26 USCA 1145)

"§ 1145. Bond to stay assessment and collection.

"Notwithstanding any provision of law imposing restrictions on the assessment and collection of deficiencies, the review under section 1142 shall not operate as a stay of assessment or collection of any portion of the amount of the deficiency determined by the Board unless a petition for review in respect of such portion is duly filed by the taxpayer, and then only if the taxpayer (1) on or before the time his petition for review is filed has filed with the Board a bond in a sum fixed by the Board not exceeding double the amount of the portion of the deficiency in respect of which the petition for review is filed, and with surety approved by the Board, conditioned upon the payment of the deficiency as finally determined, together with any interest, additional amounts, or additions to the tax provided for by law, or (2) has filed a jeopardy bond under the income or estate tax laws. If as a result of a waiver of the restrictions on the assessment and collection of a deficiency any part of the amount determined by the Board is paid after the filing of the review bond, such bond shall, at the request of the taxpayer, be proportionately reduced. 53 Stat. 165."

(26 USCA 1146)

"§ 1146. Refund, credit, or abatement of amounts disallowed.

"In cases where assessment or collection has not been stayed by the filing of a bond, then if the amount of the deficiency determined by the Board is disallowed in whole or in part by the court, the amount so disallowed shall be credited or refunded to the taxpayer, without the making of claim therefor, or, if collection has not been made, shall be abated. 53 Stat. 165."

§ 833. Civil Aeronautics Authority.¹

The Civil Aeronautics Act of 1938

(49 USCA 646)

"§ 646. Judicial review.

"(a) Any order, affirmative or negative, issued by the Authority under this chapter, except any order in respect of any foreign air carrier subject to the approval of the President as provided in section 601 of this chapter, shall be subject to review by the circuit courts of appeals of the United States or the United States Court of Appeals for the District of Columbia upon petition, filed within sixty days after the entry of such order, by any person disclosing a substantial interest in such order. After the expiration of said sixty days a petition may be filed only by leave of court upon a showing of reasonable grounds for failure to file the petition theretofore.

¹ See also, the enforcement provisions of the Clayton Act, 15 USCA 21, *infra* § 834.

"(b) A petition under this section shall be filed in the court for the circuit wherein the petitioner resides or has his principal place of business or in the United States Court of Appeals for the District of Columbia.

"(c) A copy of the petition shall, upon filing, be forthwith transmitted to the Authority by the clerk of the court; and the Authority shall thereupon certify and file in the court a transcript of the record, if any, upon which the order complained of was entered.

"(d) Upon transmittal of the petition to the Authority, the court shall have exclusive jurisdiction to affirm, modify, or set aside the order complained of, in whole or in part, and if need be, to order further proceedings by the Authority. Upon good cause shown, interlocutory relief may be granted by stay of the order or by such mandatory or other relief as may be appropriate: *Provided*, That no interlocutory relief may be granted except upon at least five days' notice to the Authority.

"(e) The findings of facts by the Authority, if supported by substantial evidence, shall be conclusive. No objection to an order of the Authority shall be considered by the court unless such objection shall have been urged before the Authority or, if it was not so urged, unless there were reasonable grounds for failure to do so.

"(f) The judgment and decree of the court affirming, modifying, or setting aside any such order of the Authority shall be subject only to review by the Supreme Court of the United States upon certification or certiorari as provided in sections 346 and 347 of Title 28. June 23, 1938, c. 601, § 1006, 52 Stat. 1024."

§ 834. Under the Clayton Act.

(15 USCA 21)

"§ 21. Enforcement provisions; procedure.

"Authority to enforce compliance with sections 13, 14, 18, and 19 of this title by the persons respectively subject thereto is hereby vested: In the Interstate Commerce Commission, where applicable to common carriers subject to chapters 1 and 8 of Title 49; in the Federal Communications Commission, where applicable to common carriers engaged in wire or radio communication or radio transmission of energy; in the Civil Aeronautics Board where applicable to air carriers and foreign air carriers subject to chapter 9 of Title 49; in the Board of Governors of the Federal Reserve System, where applicable to banks, banking associations, and trust companies; and in the Federal Trade Commission, where applicable to all other character of commerce, to be exercised as follows:

"Whenever the commission or board vested with jurisdiction thereof shall have reason to believe that any person is violating or has violated any of the provisions of said sections, it shall issue and serve upon such person a complaint stating its charges in that respect, and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. The person so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the commission or board requiring such

person to cease and desist from the violation of the law so charged in said complaint. Any person may make application, and upon good cause shown may be allowed by the commission or board, to intervene and appear in said proceeding by counsel or in person. The testimony in any such proceeding shall be reduced to writing and filed in the office of the commission or board. If upon such hearing the commission or board, as the case may be, shall be of the opinion that any of the provisions of said sections have been or are being violated, it shall make a report in writing in which it shall state its findings as to the facts, and shall issue and cause to be served on such person an order requiring such person to cease and desist from such violations and divest itself of the stock held or rid itself of the directors chosen contrary to the provisions of sections 18 and 19 of this title, if any there be, in the manner and within the time fixed by said order. Until a transcript of the record in such hearing shall have been filed in a circuit court of appeals of the United States, as hereinafter provided, the commission or board may at any time, upon such notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any report or any order made or issued by it under this section.

"If such person fails or neglects to obey such order of the commission or board while the same is in effect, the commission or board may apply to the circuit court of appeals of the United States, within any circuit where the violation complained of was or is being committed or where such person resides or carries on business for the enforcement of its order, and shall certify and file with its application a transcript of the entire record in the proceeding, including all the testimony taken and the report and order of the commission or board. Upon such filing of the application and transcript the court shall cause notice thereof to be served upon such person and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree affirming, modifying, or setting aside the order of the commission or board. The findings of the commission or board as to the facts, if supported by testimony, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material, and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the commission or board, the court may order such additional evidence to be taken before the commission or board and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The commission or board may modify its findings as to the facts, or make new findings, by reason of the additional evidence so taken, and it shall file such modified or new findings, which, if supported by testimony, shall be conclusive, and its recommendation, if any, for the modification or setting aside of its original order, with the return of such additional evidence. The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari as provided in sections 346 and 347 of Title 28.

"Any party required by such order of the commission or board to cease and desist from a violation charged may obtain a review of such order in said circuit court of appeals by filing in the court a written petition

praying that the order of the commission or board be set aside. A copy of such petition shall be forthwith served upon the commission or board, and thereupon the commission or board forthwith shall certify and file in the court a transcript of the record as hereinbefore provided. Upon the filing of the transcript the court shall have the same jurisdiction to affirm, set aside, or modify the order of the commission or board as in the case of an application by the commission or board for the enforcement of its order, and the findings of the commission or board as to the facts, if supported by testimony, shall in like manner be conclusive.

"The jurisdiction of the Circuit Court of Appeals of the United States to enforce, set aside, or modify orders of the commission or board shall be exclusive.

"Such proceedings in the circuit court of appeals shall be given precedence over other cases pending therein, and shall be in every way expedited. No order of the commission or board or the judgment of the court to enforce the same shall in any wise relieve or absolve any person from any liability under the antitrust laws.

"Complaints, orders, and other processes of the commission or board under this section may be served by anyone duly authorized by the commission or board, either (a) by delivering a copy thereof to the person to be served, or to a member of the partnership to be served, or to the president, secretary, or other executive officer or a director of the corporation to be served; or (b) by leaving a copy thereof at the principal office or place of business of such person, or (c) by registering and mailing a copy thereof addressed to such person at his principal office or place of business. The verified return by the person so serving said complaint, order, or other process setting forth the manner of said service, shall be proof of the same, and the return post-office receipt for said complaint, order, or other process registered and mailed as aforesaid shall be proof of the service of the same. Oct. 15, 1914, c. 323, § 11, 38 Stat. 734; Feb. 13, 1925, c. 229, § 2, 43 Stat. 939; June 19, 1934, c. 652, § 602 (d), 48 Stat. 1102; Aug. 23, 1935, c. 614, § 203 (a), 49 Stat. 704; June 23, 1938, c. 601, § 1107 (g), 52 Stat. 1028. Reorg. Plan No. IV, § 7, eff. June 30, 1940, 5 Fed. Reg. 2421, 54 Stat. 1235."

§ 835. Commissioner of Internal Revenue.

The Internal Revenue Code

(26 USCA 3114 (c))

"§ 3114. Alcohol permits.

"(c) Inaccurate description of denatured articles. Whenever the Commissioner has reason to believe that denatured alcohol, denatured rum, or articles do not correspond with the descriptions and limitations as to such alcohol, rum, or articles provided by law and regulations, he shall cause an analysis of said alcohol, rum, or articles to be made, and if upon such analysis the Commissioner shall find that said alcohol, rum, or articles do not so correspond, he shall give not less than fifteen days' notice in writing to the person who is the manufacturer thereof to show cause why said alcohol,

rum, or articles should not be dealt with as other distilled spirits, such notice to be served personally or by registered mail, as the Commissioner may determine, and shall specify the time when, the place where, and the name of the agent or official before whom such person is required to appear.

"If the manufacturer of said alcohol, rum, or articles fails to show to the satisfaction of the Commissioner that the alcohol, rum, or articles manufactured by him correspond to the descriptions and limitations as to such alcohol, rum, or articles provided by law and regulations, his permit to manufacture and sell the same shall be revoked. The manufacturer may by appropriate proceeding in a court of equity have the action of the Commissioner reviewed, and the court may affirm, modify, or reverse the finding of the Commissioner as the facts and law of the case may warrant, and during the pendency of such proceedings may restrain the manufacture, sale, or other disposition of such alcohol, rum or articles."

§ 836. **Commodity Exchange Commission.**

Provisions for judicial review of determinations of the Commodity Exchange Commission under the Commodity Exchange Act of 1922 are set forth with other provisions relating to the Secretary of Agriculture.

§ 837. **Court of Claims.**

(28 USCA 288)

"§ 838. **Certification to Supreme Court of questions of law; certiorari by Supreme Court to Court of Claims; no other review allowed.**

"(a) In any case in the Court of Claims, including those begun under section 287 of this title, that court at any time may certify to the Supreme Court any definite and distinct questions of law concerning which instructions are desired for the proper disposition of the cause; and thereupon the Supreme Court may give appropriate instructions on the questions certified and transmit the same to the Court of Claims for its guidance in the further progress of the cause.

"(b) In any case in the Court of Claims, including those begun under section 287 of this title, it shall be competent for the Supreme Court, upon the petition of either party, whether Government or claimant, to require, by certiorari, that the cause be certified to it for review and determination of all errors assigned, with the same power and authority, and with like effect, as if the cause had been brought there by appeal. In such event, the Court of Claims shall include in the papers certified by it the findings of fact, the conclusions of law, and the judgment or decree, as well as such other parts of the record as are material to the errors assigned, to be settled by the Court.

"The Court of Claims shall promulgate rules to govern the preparation of such record in accordance with the provisions of this section.

"In such cases the Supreme Court shall have authority to review, in addition to other questions of law, errors assigned to the effect that there is

a lack of substantial evidence to sustain a finding of fact; that an ultimate finding or findings are not sustained by the findings of evidentiary or primary facts; or that there is a failure to make any finding of fact on a material issue. As amended May 22, 1939, c. 140, 53 Stat. 752.

“(c) All judgments and decrees of the Court of Claims shall be subject to review by the Supreme Court as provided in this section, and not otherwise. (Feb. 13, 1925, c. 229, § 3, 43 Stat. 939.)”

§ 838. Court of Customs and Patent Appeals.

See the provisions for review of decisions of the United States Customs Court, *infra* section 857.

§ 839. Federal Alcohol Administration.

The Federal Alcohol Administration Act

(27 USCA 204 (h))

“§ 204. Permits

* * * * *

“(h) Appeal; procedure. An appeal may be taken by the permittee or applicant for a permit from any order of the Administrator denying an application for, or suspending, revoking, or annulling, a basic permit. Such appeal shall be taken by filing, in the circuit court of appeals of the United States within any circuit wherein such person resides or has his principal place of business, or in the United States Court of Appeals for the District of Columbia, within sixty days after the entry of such order, a written petition praying that the order of the Administrator be modified or set aside in whole or in part. A copy of such petition shall be forthwith served upon the Administrator, or upon any officer designated by him for that purpose, and thereupon the Administrator shall certify and file in the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order, in whole or in part. No objection to the order of the Administrator shall be considered by the court unless such objection shall have been urged before the Administrator or unless there were reasonable grounds for failure so to do. The finding of the Administrator as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceeding before the Administrator, the court may order such additional evidence to be taken before the Administrator and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Administrator may modify his findings as to the facts by reason of the additional evidence so taken, and he shall file with the court such modified or new findings, which, if supported by substantial evidence, shall be conclusive, and his recommenda-

tion, if any, for the modification or setting aside of the original order. The judgment and decree of the court affirming, modifying, or setting aside, in whole or in part, any such order of the Administrator shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 346 and 347 of Title 28. The commencement of proceedings under this subsection shall, unless specifically ordered by the court to the contrary, operate as a stay of the Administrator's order."

§ 840. Federal Communications Commission.²

The Communications Act of 1934

(47 USCA 402)

"§ 402. Same; procedure; appeals; procedure on appeal, hearing and judgment; costs.

"(a) The provisions of the Act of October 22, 1913 (38 Stat. 219),³ relating to the enforcing or setting aside of the orders of the Interstate Commerce Commission, are hereby made applicable to suits to enforce, enjoin, set aside, annul, or suspend any order of the Commission under this chapter (except any order of the Commission granting or refusing an application for a construction permit for a radio station, or for a radio station license, or for renewal of an existing radio station license, or for modification of an existing radio station license, or suspending a radio operator's license), and such suits are hereby authorized to be brought as provided in that Act. (As amended May 20, 1937, c. 229, § 11, 50 Stat. 197.)

"(b) An appeal may be taken, in the manner hereinafter provided, from decisions of the Commission to the United States Court of Appeals for the District of Columbia in any of the following cases:

"(1) By any applicant for a construction permit for a radio station, or for a radio station license, or for renewal of an existing radio station license, or for modification of an existing radio station license, whose application is refused by the Commission.

"(2) By any other person aggrieved or whose interests are adversely affected by any decision of the Commission granting or refusing any such application.

"(3) By any radio operator whose license has been suspended by the Commission. (As amended May 20, 1937, c. 229, § 12, 50 Stat. 197.)

"(c) Such appeal shall be taken by filing with said court within twenty days after the decision complained of is effective, notice in writing of said appeal and a statement of the reasons therefor, together with proof of service of a true copy of said notice and statement upon the Commission. Unless a later date is specified by the Commission as part of its decision, the decision complained of shall be considered to be effective as of the date on which public announcement of the decision is made at the office of the Commission in the city of Washington. The Commission shall thereupon immediately, and in any event not later than five days from the date of such

² See also, the enforcement provisions of the Clayton Act, 15 USCA 21, supra § 834. and 214 of Title 28, Judicial Code and Judiciary; and sections 16 and 50 of Title 49, Transportation. See § 844.

³ See U. S. Code sections 41, 43-48,

service upon it, mail or otherwise deliver a copy of said notice of appeal to each person shown by the records of the Commission to be interested in such appeal and to have a right to intervene therein under the provisions of this section, and shall at all times thereafter permit any such person to inspect and make copies of the appellant's statement of reasons for said appeal at the office of the Commission in the city of Washington. Within thirty days after the filing of said appeal the Commission shall file with the court the originals or certified copies of all papers and evidence presented to it upon the application or order involved, and also a like copy of its decision thereon, and shall within thirty days thereafter file a full statement in writing of the facts and grounds for its decision as found and given by it, and a list of all interested persons to whom it has mailed or otherwise delivered a copy of said notice of appeal. (As amended May 20, 1937, c. 229, § 13, 50 Stat. 197.)

"(d) Within thirty days after the filing of said appeal any interested person may intervene and participate in the proceedings had upon said appeal by filing with the court a notice of intention to intervene and a verified statement showing the nature of the interest of such party, together with proof of service of true copies of said notice and statement, both upon appellant and upon the Commission. Any person who would be aggrieved or whose interests would be adversely affected by a reversal or modification of the decision of the Commission complained of shall be considered an interested party.

"(e) At the earliest convenient time the court shall hear and determine the appeal upon the record before it, and shall have power, upon such record, to enter a judgment affirming or reversing the decision of the Commission, and in event the court shall render a decision and enter an order reversing the decision of the Commission, it shall remand the case to the Commission to carry out the judgment of the court: *Provided, however,* That the review by the court shall be limited to questions of law and that findings of fact by the Commission, if supported by substantial evidence, shall be conclusive unless it shall clearly appear that the findings of the Commission are arbitrary or capricious. The court's judgment shall be final, subject, however, to review by the Supreme Court of the United States upon writ of certiorari on petition therefor under section 347 of Title 28, by appellant, by the Commission, or by any interested party intervening in the appeal.

"(f) The court may, in its discretion, enter judgment for costs in favor of or against an appellant, and/or other interested parties intervening in said appeal, but not against the Commission, depending upon the nature of the issues involved upon said appeal and the outcome thereof. (June 7, 1934, c. 426, 48 Stat. 926; June 19, 1934, c. 652, § 402, 48 Stat. 1093; May 20, 1937, c. 229, § 13, 50 Stat. 197.)"

§ 841. Federal Power Commission.

The Federal Power Act

(16 USCA 825 *l*)

"825 *l*. Rehearings; court review of orders.

"(a) Any person, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this chapter

to which such person, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order. The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied. No proceeding to review any order of the Commission shall be brought by any person unless such person shall have made application to the Commission for a rehearing thereon.

“(b) Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the Circuit Court of Appeals of the United States for any circuit wherein the licensee or public utility to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be served upon any member of the Commission and thereupon the Commission shall certify and file with the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 346 and 347 of Title 28.

“(c) The filing of an application for rehearing under subsection (a) shall not, unless specifically ordered by the Commission, operate as a stay of the Commission's order. The commencement of proceedings under subsection (b) of this section shall not, unless specifically ordered by the court, operate as a stay of the Commission's order. June 10, 1920, c. 285, § 313, added Aug. 26, 1935, c. 687, Title II, § 213, 49 Stat. 860.”

The Natural Gas Act

(15 USCA 717r)

“§ 717r. Rehearings; court review of orders.

“(a) Any person, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this chapter to which such person, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order. The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied. No proceeding to review any order of the Commission shall be brought by any person unless such person shall have made application to the Commission for a rehearing thereon.

“(b) Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the circuit court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be served upon any member of the Commission and thereupon the Commission shall certify and file with the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission shall be final, subject to review by the Supreme Court of the United

States upon certiorari or certification as provided in sections 346 and 347 of Title 28, as amended.

"(c) The filing of an application for rehearing under subsection (a) shall not, unless specifically ordered by the Commission, operate as a stay of the Commission's order. The commencement of proceedings under subsection (b) of this section shall not, unless specifically ordered by the court, operate as a stay of the Commission's order. June 21, 1938, c. 556, § 19, 52 Stat. 831."

§ 842. Federal Reserve Board.

Authority to enforce compliance with sections 13, 14, 18 and 19 of Title 15 of the United States Code (the Clayton Act) is vested in the Board of Governors of the Federal Reserve System, where applicable to banks, banking associations, and trust companies.⁴

§ 843. Federal Trade Commission.⁵

The Federal Trade Commission Act

(15 USCA 45 (c) (d) (e) (f))

"§ 45. Unfair methods of competition unlawful; prevention by Commission.

* * * * *

"(c) Review of order; rehearing. Any person, partnership, or corporation required by an order of the Commission to cease and desist from using any method of competition or act or practice may obtain a review of such order in the circuit court of appeals of the United States, within any circuit where the method of competition or the act or practice in question was used or where such person, partnership, or corporation resides or carries on business, by filing in the court, within sixty days from the date of the service of such order, a written petition praying that the order of the Commission be set aside. A copy of such petition shall be forthwith served upon the Commission, and thereupon the Commission forthwith shall certify and file in the court a transcript of the entire record in the proceeding, including all the evidence taken and the report and order of the Commission. Upon such filing of the petition and transcript the court shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to make and enter upon the pleadings, evidence, and proceedings set forth in such transcript a decree affirming, modifying, or setting aside the order of the Commission, and enforcing the same to the extent that such order is affirmed, and to issue such writs as are ancillary to its jurisdiction or are necessary in its judgment to prevent injury to the public or to competitors pendente lite. The findings of the Commission as to the facts, if supported by evidence, shall be conclusive. To the extent that the order of the Commission is affirmed, the court shall thereupon issue

⁴ 15 USCA 21, supra § 834.

sions of the Clayton Act, 15 USCA 21,

⁵ See also the enforcement provisions supra § 834.

its own order commanding obedience to the terms of such order of the Commission. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts, or make new findings, by reason of the additional evidence so taken, and it shall file such modified or new findings, which, if supported by evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of its original order, with the return of such additional evidence. The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari, as provided in section 347 of Title 28.

“(d) **Jurisdiction of court.** The jurisdiction of the circuit court of appeals of the United States to affirm, enforce, modify, or set aside orders of the Commission shall be exclusive.

“(e) **Precedence of proceedings; exemption from liability.** Such proceedings in the circuit court of appeals shall be given precedence over other cases pending therein, and shall be in every way expedited. No order of the Commission or judgment of court to enforce the same shall in anywise relieve or absolve any person, partnership, or corporation from any liability under the Antitrust Acts.

“(f) **Service of complaints, orders and other processes; return.** Complaints, orders, and other processes of the Commission under this section may be served by anyone duly authorized by the Commission, either (a) by delivering a copy thereof to the person to be served, or to a member of the partnership to be served, or the president, secretary, or other executive officer or a director of the corporation to be served; or (b) by leaving a copy thereof at the residence or the principal office or place of business of such person, partnership or corporation; or (c) by registering and mailing a copy thereof addressed to such person, partnership, or corporation at his or its residence or principal office or place of business. The verified return by the person so serving said complaint, order, or other process setting forth the manner of said service shall be proof of the same, and the return post office receipt for said complaint, order, or other process registered and mailed as aforesaid shall be proof of the service of the same.”

§ 844. Interstate Commerce Commission.⁶

The Interstate Commerce Act

(49 USCA 16 (2))

“§ 16, par. (2) **Proceedings in courts to enforce orders; costs; attorney's fee.** If a carrier does not comply with an order for the payment of money within the time limit in such order, the complainant, or any person

⁶ See also, the enforcement provisions of the Clayton Act, 15 USCA 21, supra § 834.

for whose benefit such order was made, may file in the district court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the road of the carrier runs, or in any State court of general jurisdiction having jurisdiction of the parties, a petition setting forth briefly the causes for which he claims damages, and the order of the commission in the premises. Such suit in the district court of the United States shall proceed in all respects like other civil suits for damages, except that on the trial of such suit the findings and order of the commission shall be prima facie evidence of the facts therein stated, and except that the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings unless they accrue upon his appeal. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit."

The Urgent Deficiencies Act

(28 USCA 43-48)

"§ 43. **Venue of suits relating to orders of Interstate Commerce Commission.** The venue of any suit brought to enforce, suspend, or set aside, in whole or in part, any order of the Interstate Commerce Commission shall be in the judicial district wherein is the residence of the party or any of the parties upon whose petition the order was made, except that where the order does not relate to transportation or is not made upon the petition of any party the venue shall be in the district where the matter complained of in the petition before the commission arises, and except that where the order does not relate either to transportation or to a matter so complained of before the commission the matter covered by the order shall be deemed to arise in the district where one of the petitioners in court has either its principal office or its principal operating office. In case such transportation relates to a through shipment the term 'destination' shall be construed as meaning final destination of such shipment. (Oct. 22, 1913, c. 32, 38 Stat. 219.)

"§ 44. **Procedure in certain cases under interstate commerce laws; service of processes of court.** The procedure in the district courts (a) in respect to cases for the enforcement, otherwise than by adjudication and collection of a forfeiture or penalty or by infliction of criminal punishment, of any order of the Interstate Commerce Commission other than for the payment of money shall be as provided in sections 45, 45a, 47a, and 48 of this title and (b) in respect to cases brought to enjoin, set aside, annul, or suspend in whole or in part any order of the Interstate Commerce Commission shall be as provided in sections 45, 45a, 46, 47, 47a and 48 of this title. The orders, writs, and processes of the district courts may in the cases specified in this section and in the cases and proceedings under sections 20, 43 and 49 of Title 49, run, be served, and be returnable anywhere in the United States. (Oct. 22, 1913, c. 32, 38 Stat. 220.)

"§ 45. (Judicial Code, section 209.) **District courts; practice and procedure in certain cases.** The jurisdiction of the district courts of the cases

specified in section 44 of this title, and of the cases and proceedings under sections 20, 43 and 49 of Title 49, shall be invoked by filing in the office of the clerk of the court a written petition setting forth briefly and succinctly the facts constituting the petitioner's cause of action, and specifying the relief sought. A copy of such petition shall be forthwith served by the marshal or a deputy marshal of the district court or by the proper United States marshal or deputy marshal upon every defendant therein named, and when the United States is a party defendant, the service shall be made by filing a copy of said petition in the office of the Secretary of the Interstate Commerce Commission and in the Department of Justice. Within thirty days after the petition is served, unless that time is extended by order of the court or a judge thereof, an answer to the petition shall be filed in the clerk's office and a copy thereof mailed to the petitioner's attorney, which answer shall briefly and categorically respond to the allegations of the petition. No replication need be filed to the answer, and objections to the sufficiency of the petition or answer as not setting forth a cause of action or defense must be taken at the final hearing or by motion to dismiss the petition based on said grounds, which motion may be made at any time before answer is filed. In case no answer shall be filed as provided herein the petitioner may apply to the court on notice for such relief as may be proper upon the facts alleged in the petition. The court may, by rule, prescribe the method of taking evidence in cases pending in said court. (June 18, 1910, c. 309, § 1, 36 Stat. 539; Mar. 3, 1911, c. 231, § 209, 36 Stat. 1149; Oct. 22, 1913, c. 32, 38 Stat. 219.)

“§ 45a. (Judicial Code, sections 212, 213, amended.) **Special attorneys; participation by Interstate Commerce Commission; intervention.** The Attorney General shall have charge and control of the interests of the Government in the cases specified in section 44 of this title and in the cases and proceedings under sections 20, 43 and 49 of Title 49, in the district courts, and in the Supreme Court of the United States upon appeal from the district courts. If in his opinion the public interest requires it, he may retain and employ in the name of the United States, within the appropriations from time to time made by the Congress for such purposes, such special attorneys and counselors at law as he may think necessary to assist in the discharge of any of the duties incumbent upon him and his subordinate attorneys; and the Attorney-General shall stipulate with such special attorneys and counsel the amount of their compensation, which shall not be in excess of the sums appropriated therefor by Congress for such purposes, and shall have supervision of their action: *Provided*, That the Interstate Commerce Commission and any party or parties in interest to the proceeding before the commission, in which an order or requirement is made, may appear as parties thereto of their own motion and as of right, and be represented by their counsel, in any suit wherein is involved the validity of such order or requirement or any part thereof, and the interest of such party; and the court wherein is pending such suit may make all such rules and orders as to such appearances and representations, the number of counsel, and all matters of procedure, and otherwise, as to subserve the ends of justice, and speed the determination of such suits: *Provided further*, That

communities, associations, corporations, firms, and individuals who are interested in the controversy or question before the Interstate Commerce Commission, or in any suit which may be brought by anyone under the provisions of the aforesaid sections relating to action of the Interstate Commerce Commission, may intervene in said suit or proceedings at any time after the institution thereof; and the Attorney General shall not dispose of or discontinue said suit or proceeding over the objection of such party or intervenor aforesaid, but said intervenor or intervenors may prosecute, defend, or continue said suit or proceeding unaffected by the action or non-action of the Attorney General therein.

"Complainants before the Interstate Commerce Commission interested in a case shall have the right to appear and be made parties to the case and be represented before the courts by counsel, under such regulations as are now permitted in similar circumstances under the rules and practice of equity courts of the United States. (June 18, 1910, c. 309, § 5, 36 Stat. 543; Mar. 3, 1911, c. 231, §§ 212, 213, 36 Stat. 1150, 1151; Oct. 22, 1913, c. 32, 38 Stat. 220.)

"§ 46. (Judicial Code, section 208.) Suits to enjoin orders of Interstate Commerce Commission to be against United States. Suits to enjoin, set aside, annul, or suspend any order of the Interstate Commerce Commission shall be brought in the district court against the United States. The pendency of such suit shall not of itself stay or suspend the operation of the order of the Interstate Commerce Commission; but the court, in its discretion, may restrain or suspend, in whole or in part, the operation of the commission's order pending the final hearing and determination of the suit. (June 18, 1910, c. 309, § 3, 36 Stat. 542; Mar. 3, 1911, c. 231, § 208, 36 Stat. 1149; Oct. 22, 1913, c. 32, 38 Stat. 219.)"

"§ 47. Interlocutory injunctions as to orders of Interstate Commerce Commission; appeal to Supreme Court. No interlocutory injunction suspending or restraining the enforcement, operation, or execution of, or setting aside, in whole or in part, any order made or entered by the Interstate Commerce Commission shall be issued or granted by any district court of the United States, or by any judge thereof, or by any circuit judge acting as district judge, unless the application for the same shall be presented to a circuit or district judge, and shall be heard and determined by three judges, of whom at least one shall be a circuit judge, and unless a majority of said three judges shall concur in granting such application. When such application as aforesaid is presented to a judge, he shall immediately call to his assistance to hear and determine the application two other judges. Said application shall not be heard or determined before at least five days' notice of the hearing has been given to the Interstate Commerce Commission, to the Attorney General of the United States, and to such other persons as may be defendants in the suit: *Provided*, That in cases where irreparable damage would otherwise ensue to the petitioner, a majority of said three judges concurring, may, on hearing, after not less than three days' notice to the Interstate Commerce Commission and the Attorney General, allow

a temporary stay or suspension, in whole or in part, of the operation of the order of the Interstate Commerce Commission for not more than sixty days from the date of the order of said judges pending the application for the order or injunction, in which case the said order shall contain a specific finding, based upon evidence submitted to the judges making the order and identified by reference thereto, that such irreparable damage would result to the petitioner and specifying the nature of the damage. The said judges may, at the time of hearing such application, upon a like finding, continue the temporary stay or suspension in whole or in part until decision upon the application. The hearing upon such application for an interlocutory injunction shall be given precedence and shall be in every way expedited and be assigned for a hearing at the earliest practicable day after the expiration of the notice hereinbefore provided for. An appeal may be taken direct to the Supreme Court of the United States from the order granting or denying, after notice and hearing, an interlocutory injunction, in such case if such appeal be taken within thirty days after the order, in respect to which complaint is made, is granted or refused; and upon the final hearing of any suit brought to suspend or set aside, in whole or in part, any order of said commission the same requirement as to judges and the same procedure as to expedition and appeal shall apply. (Oct. 22, 1913, c. 32, 38 Stat. 220.)

“§ 47a. (Judicial Code, section 210.) **Appeal to Supreme Court from final decree; time for taking; priority.** A final judgment or decree of the district court in the cases specified in section 44 of this title may be reviewed by the Supreme Court of the United States if appeal to the Supreme Court be taken by an aggrieved party within sixty days after the entry of such final judgment or decree, and such appeals may be taken in like manner as appeals are taken under existing law in equity cases. And in such cases the notice required shall be served upon the defendants in the case and upon the attorney general of the State. The district court may direct the original record instead of a transcript thereof to be transmitted on appeal. The Supreme Court may affirm, reverse, or modify as the case may require the final judgment or decree of the district court in the cases specified in section 44 of this title. Appeal to the Supreme Court, however, shall in no case supersede or stay the judgment or decree of the district court appealed from, unless the Supreme Court or a justice thereof shall so direct, and appellant shall give bond in such form and of such amount as the Supreme Court, or the justice of that court allowing the stay, may require. Appeals to the Supreme Court under this section and section 47 of this title shall have priority in hearing and determination over all other causes except criminal causes in that court. (Mar. 3, 1911, c. 231, § 210, 36 Stat. 1150; Oct. 22, 1913, c. 32, 38 Stat. 220.)

“§ 48. (Judicial Code, section 211.) **Suits to be against United States; intervention by United States.** All cases and proceedings specified in section 44 of this title shall be brought by or against the United States, and the United States may intervene in any case or proceeding whenever, though

it has not been made a party, public interests are involved. (June 18, 1910, c. 309, § 4, 36 Stat. 542; Mar. 3, 1911, c. 231, § 211, 36 Stat. 1150; Oct. 22, 1913, c. 32, 38 Stat. 219.)"

§ 845. National Labor Relations Board.

The National Labor Relations Act
(29 USCA 160 (e) (f) (g) (h) (i))

"§ 160. Prevention of unfair labor practices.

* * * * *

"(e) **Petition to court for enforcement of order; proceedings; review of judgment.** The Board shall have power to petition any circuit court of appeals of the United States (including the Court of Appeals of the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the Supreme Court of the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceeding, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board as to the facts, if supported by evidence, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the transcript. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which, if supported by evidence, shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate circuit court of appeals if application was made to the district court as hereinabove provided, and by the Supreme

Court of the United States upon writ of certiorari or certification as provided in sections 346 and 347 of Title 28.

“(f) **Review of final order of Board on petition to court.** Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the Court of Appeals of the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith served upon the Board, and thereupon the aggrieved party shall file in the court a transcript of the entire record in the proceeding, certified by the Board, including the pleading and testimony upon which the order complained of was entered and the findings and order of the Board. Upon such filing, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e), and shall have the same exclusive jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; and the findings of the Board as to the facts, if supported by evidence, shall in like manner be conclusive.

“(g) **Institution of court proceedings as stay of Board's order.** The commencement of proceedings under subsection (e) or (f) of this section shall not, unless specifically ordered by the court, operate as a stay of the Board's order.

“(h) **Jurisdiction of courts unaffected by limitations prescribed in chapter 6 of this title.** When granting appropriate temporary relief or a restraining order, or making and entering a decree enforcing, modifying, and enforcing as so modified or setting aside in whole or in part an order of the Board, as provided in this section, the jurisdiction of courts sitting in equity shall not be limited by sections 101 to 115 of this title.

“(i) **Expeditions hearings on petitions.** Petitions filed under this chapter shall be heard expeditiously, and if possible within ten days after they have been docketed. (July 5, 1935, c. 372, § 10, 49 Stat. 453.)”

§ 846. National Mediation Board: Board of Arbitration.

(45 USCA 159)

“§ 159. Award and judgment thereon; effect of chapter on individual employee.

“**First. Filing of award.** The award of a board of arbitration, having been acknowledged as herein provided, shall be filed in the clerk's office of the district court designated in the agreement to arbitrate.

“**Second. Conclusiveness of award; judgment.** An award acknowledged and filed as herein provided shall be conclusive on the parties as to the merits and facts of the controversy submitted to arbitration, and unless, within ten days after the filing of the award, a petition to impeach the award, on the grounds hereinafter set forth, shall be filed in the clerk's office of the court

in which the award has been filed, the court shall enter judgment on the award, which judgment shall be final and conclusive on the parties.

"Third. Impeachment of award; grounds. Such petition for the impeachment or contesting of any award so filed shall be entertained by the court only on one or more of the following grounds:

"(a) That the award plainly does not conform to the substantive requirements laid down by this chapter for such awards, or that the proceedings were not substantially in conformity with this chapter;

"(b) That the award does not conform, nor confine itself, to the stipulations of the agreement to arbitrate; or

"(c) That a member of the board of arbitration rendering the award was guilty of fraud or corruption; or that a party to the arbitration practiced fraud or corruption which fraud or corruption affected the result of the arbitration: *Provided, however,* That no court shall entertain any such petition on the ground that an award is invalid for uncertainty; in such case the proper remedy shall be a submission of such award to a reconvened board, or subcommittee thereof, for interpretation, as provided by this chapter: *Provided, further,* That an award contested as herein provided shall be construed liberally by the court, with a view to favoring its validity, and that no award shall be set aside for trivial irregularity or clerical error, going only to form and not to substance.

"Fourth. Effect of partial invalidity of award. If the court shall determine that a part of the award is invalid on some ground or grounds designated in this section as a ground of invalidity, but shall determine that a part of the award is valid, the court shall set aside the entire award: *Provided, however,* That, if the parties shall agree thereto, and if such valid and invalid parts are separable, the court shall set aside the invalid part, and order judgment to stand as to the valid part.

"Fifth. Appeal; record. At the expiration of ten days from the decision of the district court upon the petition filed as aforesaid, final judgment shall be entered in accordance with said decision, unless during said ten days either party shall appeal therefrom to the circuit court of appeals. In such case only such portion of the record shall be transmitted to the appellate court as is necessary to the proper understanding and consideration of the questions of law presented by said petition and to be decided.

"Sixth. Finality of decision of circuit court of appeals. The determination of said circuit court of appeals upon said questions shall be final, and, being certified by the clerk thereof to said district court, judgment pursuant thereto shall thereupon be entered by said district court.

"Seventh. Judgment where petitioner's contentions are sustained. If the petitioner's contentions are finally sustained, judgment shall be entered setting aside the award in whole or, if the parties so agree, in part; but in such case the parties may agree upon a judgment to be entered disposing of the subject matter of the controversy, which judgment when entered shall have the same force and effect as judgment entered upon an award.

"Eighth. Duty of employee to render service without consent; right to quit. Nothing in this chapter shall be construed to require an individual employee to render labor or service without his consent, nor shall anything in this chapter be construed to make the quitting of his labor or service by an individual employee an illegal act; nor shall any court issue any process to

compel the performance by an individual employee of such labor or service, without his consent. (May 20, 1926, c. 347, § 9, 44 Stat. 585.)”

§ 847. National Railroad Adjustment Board.

The Railway Labor Act of 1926, as amended
(45 USCA 153 (p) (q))

“§ 153. National Railroad Adjustment Board.

* * * * *

“(p) If a carrier does not comply with an order of a division of the Adjustment Board within the time limit in such order, the petitioner, or any person for whose benefit such order was made, may file in the District Court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the carrier operates, a petition setting forth briefly the causes for which he claims relief, and the order of the division of the Adjustment Board in the premises. Such suit in the District Court of the United States shall proceed in all respects as other civil suits, except that on the trial of such suit the findings and order of the division of the Adjustment Board shall be prima facie evidence of the facts therein stated, and except that the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings, unless they accrue upon his appeal, and such costs shall be paid out of the appropriation for the expenses of the courts of the United States. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit. The district courts are empowered, under the rules of the court governing actions at law, to make such order and enter such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce or set aside the order of the division of the Adjustment Board.

“(q) All actions at law based upon the provisions of this section shall be begun within two years from the time the cause of action accrues under the award of the division of the Adjustment Board, and not after.”

§ 848. Patent Office.

Patents

(35 USCA 59a et seq.)

“§ 59a. Same; from board of appeals.

“If any applicant is dissatisfied with the decision of the board of appeals, he may appeal to the United States Court of Customs and Patent Appeals, in which case he waives his right to proceed under section 63 of this title. If any party to an interference is dissatisfied with the decision of the board of interference examiners, he may appeal to the United States Court of Customs and Patent Appeals, provided that such appeal shall be dismissed if any adverse party to such interference shall, within twenty days after the appellant shall have filed notice of appeal according to section 60 of this title, file notice with the Commissioner of Patents that he elects to have all

further proceedings conducted as provided in section 63. Thereupon the appellant shall have thirty days thereafter within which to file a bill in equity under said section 63, in default of which the decisions appealed from shall govern the further proceedings in the case. R. S. § 4911; March 2, 1927, c. 273, § 8, 44 Stat. 1336; March 2, 1929, c. 488, § 2, 45 Stat. 1476; Aug. 5, 1939, c. 451, § 3, 53 Stat. 1212."

"§ 60. Same; notice of appeal.

"When an appeal is taken to the United States Court of Customs and Patent Appeals, the appellant shall give notice thereof to the commissioner, and file in the Patent Office, within such time as the commissioner shall appoint, his reasons of appeal, specifically set forth in writing. R. S. § 4912; Feb. 9, 1893, c. 74, § 9, 27 Stat. 436; March 2, 1929, c. 488, § 2 (b), 45 Stat. 1476."

"§ 61. Same; proceedings on appeal.

"The court shall, before hearing such appeal, give notice to the commissioner of the time and place of the hearing, and on receiving such notice the commissioner shall give notice of such time and place in such manner as the court may prescribe, to all parties who appear to be interested therein. The party appealing shall lay before the court certified copies of all the original papers and evidence in the case, and the commissioner shall furnish the court with the grounds of his decision, fully set forth in writing, touching all the points involved by the reasons of appeal. R. S. § 4913; March 2, 1927, c. 273, § 10, 44 Stat. 1336."

"§ 62. Same; determination of appeal; revision of former decision.

"The court, on petition, shall hear and determine such appeal, and revise the decision appealed from in a summary way, on the evidence produced before the commissioner, at such early and convenient time as the court may appoint; and the revision shall be confined to the points set forth in the reasons of appeal. After hearing the case the court shall return to the commissioner a certificate of its proceedings and decision, which shall be entered of record in the Patent Office, and shall govern the further proceedings in the case. But no opinion or decision of the court in any such case shall preclude any person interested from the right to contest the validity of such patent in any court wherein the same may be called in question. R. S. § 4914."

"§ 63. Bill in equity to obtain patent.

"Whenever a patent on application is refused by the Board of Appeals or whenever any applicant is dissatisfied with the decision of the board of interference examiners, the applicant, unless appeal has been taken to the United States Court of Customs and Patent Appeals, and such appeal is pending or has been decided, in which case no action may be brought under this section, may have remedy by bill in equity, if filed within six months after such refusal or decision; and the court having cognizance thereof, on notice to adverse parties and other due proceedings had, may adjudge that such applicant is entitled, according to law, to receive a patent for his invention, as specified in his claim or for any part thereof, as the facts in the

case may appear. And such adjudication, if it be in favor of the right of the applicant, shall authorize the commissioner to issue such patent on the applicant filing in the Patent Office a copy of the adjudication and otherwise complying with the requirements of law. In all cases where there is no opposing party a copy of the bill shall be served on the commissioner; and all the expenses of the proceedings shall be paid by the applicant, whether the final decision is in his favor or not. In all suits brought hereunder where there are adverse parties the record in the Patent Office shall be admitted in whole or in part, on motion of either party, subject to such terms and conditions as to costs, expenses, and the further cross-examination of the witnesses as the court may impose, without prejudice, however, to the right of the parties to take further testimony. The testimony and exhibits, or parts thereof, of the record in the Patent Office when admitted shall have the same force and effect as if originally taken and produced in the suit. R. S. § 4915; February 9, 1893, c. 74, § 9, 27 Stat. 436; March 2, 1927, c. 273, § 11, 44 Stat. 1336; March 2, 1929, c. 488, § 2(b), 45 Stat. 1476; August 5, 1939, c. 451, § 4, 53 Stat. 1212."

"§ 72a. Jurisdiction of district court of the United States for the District of Columbia in certain equity suits where adverse parties reside elsewhere; plurality of districts; service of writs.

"Upon the filing of a bill in the district court of the United States for the District of Columbia wherein remedy is sought under section 63 or section 66 of this title, without seeking other remedy, if it shall appear that there is an adverse party residing in a foreign country, or adverse parties residing in a plurality of districts not embraced within the same State, the court shall have jurisdiction thereof and writs shall, unless the adverse party or parties voluntarily make appearance, be issued against all of the adverse parties with the force and effect and in the manner set forth in section 113 of Title 28; provided that writs issued against parties residing in foreign countries pursuant to this section may be served by publication or otherwise as the court shall direct. March 3, 1927, c. 364, 44 Stat. 1394; June 25, 1936, c. 804, 49 Stat. 1921."

Trade Marks (15 USCA 89)

"§ 89. Appeal from decision of Commissioner of Patents.

"If an applicant for registration of a trade-mark, or a party to an interference as to a trade-mark, or a party who has filed opposition to the registration of a trade-mark, or party to an application for the cancellation of the registration of a trade-mark, is dissatisfied with the decision of the Commissioner of Patents, he may appeal to the United States Court of Customs and Patent Appeals, on complying with the conditions required in case of an appeal from the decision of the commissioner by an applicant for patent, or a party to an interference as to an invention, and the same rules of practice and procedure shall govern in every stage of such proceedings, as far as the same may be applicable. Feb. 20, 1905, c. 592, § 9, 33 Stat. 727; Mar. 2, 1929, c. 488, § 2(b), 45 Stat. 1476."

§ 849. Railroad Retirement Board.

The Railroad Retirement Act of 1937

(45 USCA 228k)

"§ 228k. Court jurisdiction.

"An employee or other person aggrieved may apply to the district court of any district wherein the Board may have established an office or to the District Court of the United States for the District of Columbia to compel the Board (1) to set aside an action or decision of the Board claimed to be in violation of a legal right of the applicant or (2) to take action or to make a decision necessary for the enforcement of a legal right of the applicant. Such court shall have jurisdiction to entertain such application and to grant appropriate relief. The decision of the Board with respect to an annuity, pension, or death benefit shall not be subject to review by any court unless suit is commenced within one year after the decision shall have been entered upon the records of the Board and communicated to the person claiming the annuity, pension, or death benefit. The jurisdiction herein specifically conferred upon the Federal courts shall not be held exclusive of any jurisdiction otherwise possessed by such courts to entertain actions at law or suits in equity in aid of the enforcement of rights or obligations arising under the provisions of this Act or the Railroad Retirement Act of 1935. Aug. 29, 1935, c. 812, § 11, as amended June 24, 1937, c. 382, Part I, § 1, 50 Stat. 315."

The Railroad Unemployment Insurance Act of 1938

(45 USCA 355)

"§ 355. Claims for benefits.

* * * * *

"(f) Review of final order of Board on petition to District Court; costs. Any claimant, and any railway labor organization organized in accordance with the provisions of the Railway Labor Act, of which such claimant is a member, may, only after all administrative remedies within the Board have been availed of and exhausted, obtain a review of any final decision of the Board with reference to a claim for benefits by filing a petition for review within ninety days after the mailing of notice of such decision to the claimant, or within such further time as the Board may allow, in the United States district court for the judicial district in which the claimant resides, or in the United States District Court for the District of Columbia. A copy of such petition, together with initial process, shall forthwith be served upon the Board or any officer designated by it for such purpose. Service may be made upon the Board by registered mail addressed to the Chairman. Within fifteen days after receipt of service, or within such additional time as the court may allow, the Board shall certify and file with the court in which such petition has been filed a transcript of the record upon which the findings and decision complained of are based. Upon such filing the court shall have exclusive jurisdiction of the proceeding and of the question determined therein, and shall give precedence in the adjudication thereof over all other civil cases not otherwise entitled by law to precedence. It shall have power to enter

upon the pleadings and transcript of the record a decree affirming, modifying, or reversing the decision of the Board, with or without remanding the cause for rehearing. The findings of the Board as to the facts, if supported by evidence and in the absence of fraud, shall be conclusive. No additional evidence shall be received by the court, but the court may order additional evidence to be taken before the Board, and the Board may, after hearing such additional evidence, modify its findings of fact and conclusions and file such additional or modified findings and conclusions with the court, and the Board shall file with the court a transcript of the additional record. The judgment and decree of the court shall be final, subject to review as in equity cases.

"An applicant for review of a final decision of the Board concerning a claim for benefits shall not be liable for costs, including costs of service, or costs of printing records, except that costs may be assessed by the court against such applicant if the court determines that the proceedings for such review have been instituted or continued without reasonable ground.

"(g) **Finality of Board decisions.** Findings of fact and conclusions of law of the Board in the determination of any claim for benefits or refund and the determination of the Board that the unexpected funds in the account are available for the payment of any claim for benefits or refund under this chapter, shall be, except as provided in subsection (f) of this section, binding and conclusive for all purposes and upon all persons, including the Comptroller General and any other administrative or accounting officer, employee, or agent of the United States, and shall not be subject to review in any manner other than that set forth in subsection (f) of this section."

§ 850. Secretary of Agriculture.

The Commodity Exchange Act of 1922

(7 USCA 8, 9 and 10)

"§ 8. Application for designation as 'contract market'; suspension or revocation of designation; composition of commission; review by circuit court of appeals.

"Any board of trade desiring to be designated a 'contract market' shall make application to the Secretary of Agriculture for such designation and accompany the same with a showing that it complies with the above conditions, and with a sufficient assurance that it will continue to comply with the above requirements.

"A commission composed of the Secretary of Agriculture, the Secretary of Commerce, and the Attorney General is authorized to suspend for a period not to exceed six months or to revoke the designation of any board of trade as a 'contract market' upon a showing that such board of trade has failed or is failing to comply with any of the above requirements or is not enforcing its rules of government made a condition of its designation as set forth in section 7 of this chapter. Such suspension or revocation shall only be after a notice to the officers of the board of trade affected and upon a hearing: *Provided*, That such suspension or revocation shall be final and conclusive unless within fifteen days after such suspension or revocation by the

said commission such board of trade appeals to the circuit court of appeals for the circuit in which it has its principal place of business by filing with the clerk of such court a written petition praying that the order of the said commission be set aside or modified in the manner stated in the petition, together with a bond in such sum as the court may determine, conditioned that such board of trade will pay the costs of the proceedings if the court so directs. The clerk of the court in which such a petition is filed shall immediately cause a copy thereof to be delivered to the Secretary of Agriculture, chairman of said commission, or any member thereof, and the said commission shall forthwith prepare, certify, and file in the court a full and accurate transcript of the record in such proceedings, including the notice to the board of trade, a copy of the charges, the evidence, and the report and order. The testimony and evidence taken or submitted before the said commission duly certified and filed as aforesaid as a part of the record shall be considered by the court as the evidence in the case. The proceedings in such cases in the circuit court of appeals shall be made a preferred cause and shall be expedited in every way. Such a court may affirm or set aside the order of the said commission or may direct it to modify its order. No such order of the said commission shall be modified or set aside by the circuit court of appeals unless it is shown by the board of trade that the order is unsupported by the weight of the evidence or was issued without due notice and a reasonable opportunity having been afforded to such board of trade for a hearing, or infringes the Constitution of the United States, or is beyond the jurisdiction of said commission: *Provided further*, That if the Secretary of Agriculture shall refuse to designate as a contract market any board of trade that has made application therefor, then such board of trade may appeal from such refusal to the commission described therein, consisting of the Secretary of Agriculture, the Secretary of Commerce, and the Attorney General of the United States, with the right to appeal as provided for in other cases in this section, the decision on such appeal to be final and binding on all parties interested. Sept. 21, 1922, c. 369, § 6a, 42 Stat. 1001.

“§ 9. Exclusion of persons from privilege of ‘contract markets’; procedure for exclusion; review by circuit court of appeals.

“If the Secretary of Agriculture has reason to believe that any person (other than a contract market) is violating or has violated any of the provisions of this chapter, or any of the rules and regulations made pursuant to its requirements, or has manipulated or is attempting to manipulate the market price of any commodity, in interstate commerce, or for future delivery on or subject to the rules of any board of trade, he may serve upon such person a complaint stating his charges in that respect, to which complaint shall be attached or contained therein a notice of hearing, specifying a day and place not less than three days after the service thereof, requiring such person to show cause why an order should not be made directing that all contract markets until further notice of the Secretary of Agriculture refuse all trading privileges to such person, and to show cause why the registration of such person, if registered as futures commission merchant or as floor broker hereunder, should not be suspended or revoked. Said hearing may be held in Washington, District of Columbia, or elsewhere, before the Secretary of

Agriculture, or before a referee designated by the Secretary of Agriculture, which referee shall cause all evidence to be reduced to writing and forthwith transmit the same to the Secretary of Agriculture. Upon evidence received, the Secretary of Agriculture may require all contract markets to refuse such person all trading privileges thereon for such period as may be specified in the order, and, if such person is registered as futures commission merchant or as floor broker hereunder, may suspend, for a period not to exceed six months, or revoke, the registration of such person. Notice of such order shall be sent forthwith by registered mail or delivered to the offending person and to the governing boards of said contract markets.

"After the issuance of the order by the Secretary of Agriculture, as aforesaid, the person against whom it is issued may obtain a review of such order or such other equitable relief as to the court may seem just by filing in the United States circuit court of appeals of the circuit in which the petitioner is doing business a written petition praying that the order of the Secretary of Agriculture be set aside. A copy of such petition shall be forthwith served upon the Secretary of Agriculture by delivering such copy to him, and thereupon the Secretary of Agriculture shall forthwith certify and file in the court a transcript of the record theretofore made, including evidence received. Upon the filing of the transcript the court shall have jurisdiction to affirm, to set aside, or modify the order of the Secretary of Agriculture, and the findings of the Secretary of Agriculture as to the facts, if supported by the weight of evidence, shall in like manner be conclusive. Sept. 21, 1922, c. 369, § 6b, 42 Stat. 1001; June 15, 1936, c. 545, § 8, (a)-(d), (h)-(j), 49 Stat. 1498, 1499.

"§ 10. Review by Supreme Court on certiorari.

"In proceedings under sections 8 and 9 of this chapter the judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari, as provided in section 347 of Title 28, as amended. Sept. 21, 1922, c. 369, § 6b, 42 Stat. 1001; June 15, 1936, c. 545, § 8(k), 49 Stat. 1499."

The Packers and Stockyards Act of 1921

(7 USCA 194, 217)

"§ 194. Conclusiveness of order; appeal and review; temporary and final injunction.

"(a) An order made under section 193 of this chapter shall be final and conclusive unless within thirty days after service the packer appeals to the circuit court of appeals for the circuit in which he has his principal place of business, by filing with the clerk of such court a written petition praying that the Secretary's order be set aside or modified in the manner stated in the petition, together with a bond in such sum as the court may determine, conditioned that such packer will pay the costs of the proceedings if the court so directs.

"(b) The clerk of the court shall immediately cause a copy of the petition to be delivered to the Secretary, and the Secretary shall forthwith prepare, certify, and file in the court a full and accurate transcript of the

record in such proceedings, including the complaint, the evidence, and the report and order. If before such transcript is filed the Secretary amends or sets aside his report or order, in whole or in part, the petitioner may amend the petition within such time as the court may determine, on notice to the Secretary.

"(c) At any time after such transcript is filed the court, on application of the Secretary, may issue a temporary injunction restraining, to the extent it deems proper, the packer and his officers, directors, agents, and employees, from violating any of the provisions of the order pending the final determination of the appeal.

"(d) The evidence so taken or admitted, duly certified and filed as aforesaid as a part of the record, shall be considered by the court as the evidence in the case. The proceedings in such cases in the circuit court of appeals shall be made a preferred cause and shall be expedited in every way.

"(e) The court may affirm, modify, or set aside the order of the Secretary.

"(f) If the court determines that the just and proper disposition of the case requires the taking of additional evidence, the court shall order the hearing to be reopened for the taking of such evidence, in such manner and upon such terms and conditions as the court may deem proper. The Secretary may modify his findings as to the facts, or make new findings, by reason of the additional evidence so taken, and he shall file such modified or new findings and his recommendations, if any, for the modification or setting aside of his order, with the return of such additional evidence.

"(g) If the circuit court of appeals affirms or modifies the order of the Secretary, its decree shall operate as an injunction to restrain the packer, and his officers, directors, agents, and employees from violating the provisions of such order or such order as modified.

"(h) The circuit court of appeals shall have exclusive jurisdiction to review, and to affirm, set aside, or modify, such orders of the Secretary, and the decree of such court shall be final except that it shall be subject to review by the Supreme Court of the United States upon certiorari, as provided in section 347 of Title 28, if such writ is duly applied for within sixty days after entry of the decree. The issue of such writ shall not operate as a stay of the decree of the circuit court of appeals, in so far as such decree operates as an injunction unless so ordered by the Supreme Court.

"(i) For the purposes of sections 191 to 195 of this chapter the term 'circuit court of appeals,' in case the principal place of business of the packer is in the District of Columbia, means the United States Court of Appeals for the District of Columbia. Aug. 15, 1921, c. 64, § 204, 42 Stat. 162; June 7, 1934, c. 426, 48 Stat. 926."

"§ 217. Proceedings for suspension of orders.

"For the purposes of sections 201 to 217 inclusive, of this chapter, the provisions of all laws relating to the suspending or restraining the enforcement, operation, or execution of, or the setting aside in whole or in part the orders of the Interstate Commerce Commission, are made applicable to the jurisdiction, powers, and duties of the Secretary in enforcing the provisions of sections 201 to 217 inclusive, of this chapter, and to any person subject

to the provisions of sections 201 to 217, inclusive, of this chapter. Aug. 15, 1921, c. 64, § 316, 42 Stat. 168.”

The Perishable Agricultural Commodities Act

(7 USCA 499g (b) (c), 499k)

“§ 499g. Reparation order—Determination by Secretary of Agriculture of amount of damages; order for payment.

* * * * *

“(b) Failure to comply with order of Secretary; suit in federal court to enforce liability; order of Secretary as evidence; costs and fees. If any commission merchant, dealer, or broker does not pay the reparation award within the time specified in the Secretary’s order, the complainant, or any person for whose benefit such order was made, may within three years of the date of the order file in the district court of the United States for the district in which he resides or in which is located the principal place of business of the commission merchant, dealer, or broker, or in any State court having general jurisdiction of the parties, a petition setting forth briefly the causes for which he claims damages and the order of the Secretary in the premises. The orders, writs, and processes of the district courts may in these cases run, be served, and be returnable anywhere in the United States. Such suit in the district court shall proceed in all respects like other civil suits for damages, except that the findings and orders of the Secretary shall be prima-facie evidence of the facts therein stated, and the petitioner shall not be liable for costs in the district court, nor for costs at any subsequent state of the proceedings, unless they accrue upon his appeal. If the petitioner finally prevails, he shall be allowed a reasonable attorney’s fee, to be taxed and collected as a part of the costs of the suit;

“(c) Appeal from reparation order; proceedings. Either party adversely affected by the entry of a reparation order by the Secretary may, within thirty days from and after the date of such order, appeal therefrom to the district court of the United States for the district in which said hearing was held: *Provided*, That in cases handled without a hearing in accordance with paragraphs (e) and (d) of section 499f or in which a hearing has been waived by agreement of the parties, appeal shall be to the district court of the United States for the district in which the party complained against is located. Such appeal shall be perfected by the filing of a notice thereof together with a petition in duplicate which shall recite prior proceedings before the Secretary, and shall state the grounds upon which petitioner relies to defeat the right of the adverse party to recover the damages claimed, with the clerk of said court with proof of service thereof upon the adverse party, together with a bond in double the amount of the reparation award conditioned upon the payment of the judgment entered by the court plus interest and costs, including a reasonable attorney’s fee for the appellee, if the appellee shall prevail. The clerk of court shall immediately forward a copy thereof to the Secretary of Agriculture, who shall forthwith prepare, certify, and file in said court a true copy of the Secretary’s decision, findings of fact, conclusions, and order in said case, together with copies of the pleadings upon which the case was heard and submitted to the Secretary. Such suit

in the district court shall be a trial de novo and shall proceed in all respects like other civil suits for damages, except that the findings of fact and order or orders of the Secretary shall be prima-facie evidence of the facts therein stated. Appellee shall not be liable for costs in said court if appellee prevails he shall be allowed a reasonable attorney's fee to be taxed and collected as a part of his costs. Such petition and pleadings certified by the Secretary upon which decision was made by him shall upon filing in the district court constitute the pleadings upon which said trial de novo shall proceed subject to any amendment allowed in that court; As amended May 14, 1940, c. 196, 54 Stat. 214."

"§ 499k. Injunctions; application of injunction laws governing orders of Interstate Commerce Commission.

"For the purposes of this chapter the provisions of all laws relating to the suspending or restraining of the enforcement, operation, or execution, or the setting aside in whole or in part, of the orders of the Interstate Commerce Commission are made applicable to orders of the Secretary under this chapter and to any person subject to the provisions of this chapter. June 10, 1930, c. 436, § 11, 46 Stat. 535."

Agricultural Adjustment (1935 Act)

(7 USCA 608c (15) (A) (B))

"§ 608c. Orders regulating handling of commodity—Issuance by Secretary.

* * * * *

"(15) Petition by handler for modification of order or exemption; court review of ruling of Secretary. (A) Any handler subject to an order may file a written petition with the Secretary of Agriculture, stating that any such order or any provision of any such order or any obligation imposed in connection therewith is not in accordance with law and praying for a modification thereof or to be exempted therefrom. He shall thereupon be given an opportunity for a hearing upon such petition, in accordance with regulations made by the Secretary of Agriculture, with the approval of the President. After such hearing, the Secretary shall make a ruling upon the prayer of such petition which shall be final, if in accordance with law.

"(B) The District Courts of the United States (including the district court of the United States for the District of Columbia) in any district in which such handler is an inhabitant, or has his principal place of business, are hereby vested with jurisdiction in equity to review such ruling, provided a bill in equity for that purpose is filed within twenty days from the date of the entry of such ruling. Service of process in such proceedings may be had upon the Secretary by delivering to him a copy of the bill of complaint. If the court determines that such ruling is not in accordance with law, it shall remand such proceedings to the Secretary with directions either (1) to make such ruling as the court shall determine to be in accordance with law, or (2) to take such further proceedings as, in its opinion, the law requires. The pendency of proceedings instituted pursuant to this subsection (15) shall not impede, hinder, or delay the United States or the Secretary of Agriculture from obtaining relief pursuant to section 608a (6) of this

title. Any proceedings brought pursuant to section 608a (6) of this title (except where brought by way of counterclaim in proceedings instituted pursuant to this subsection (15)) shall abate whenever a final decree has been rendered in proceedings between the same parties, and covering the same subject matter, instituted pursuant to this subsection (15)."

Agricultural Adjustment (1936 Act)

(7 USCA 648(g), 651)

"§ 648. Procedure on claims for refunds of processing taxes.

* * * * *

"(g) A review of the decision of the Board, made after the hearing provided in this section, may be obtained by the claimant or Commissioner by filing a petition for review in the Circuit Court of Appeals of the United States within any circuit wherein such claimant resides, or has his principal place of business, or, if none, in the United States Court of Appeals for the District of Columbia, or any such court which may be designated by the Commissioner and the claimant by stipulation in writing, within three months after the date of the mailing to the claimant and the Commissioner of the copy of the findings and decision of the Board. A copy of such petition shall forthwith be served upon the Commissioner or upon any officer designated by him for that purpose, or upon the claimant, according to which party files such petition, and upon the Board. Thereupon the Board shall certify and file in the court, in which such petition has been filed, a transcript of the record upon which the findings and decision complained of were based. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm the decision of the Board, or to modify or reverse such decision, if it is not in accordance with law, with or without remanding the cause for a rehearing, as justice may require. No objection shall be considered by the court unless such objection shall have been urged before the Board or division and the presiding officer, or unless there were reasonable grounds for failure so to do. If the claimant or the Commissioner shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material, and that there were reasonable grounds for failure to adduce such evidence in the hearing before the presiding officer, the court may order such additional evidence to be taken before such officer, and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Board may modify its findings of fact and decision by reason of the additional evidence so taken and it shall file with the court such modified or new findings and decision. The judgment of the court shall be final, subject to review by the Supreme Court of the United States, upon certification or certiorari as provided in sections 346 and 347 of Title 28. Such courts are authorized to adopt rules for the filing of petitions for review, the preparation of the record for review, and the conduct of the proceedings on review. If the decision of the Board is affirmed, costs shall be awarded against the claimant, and if such decision is reversed, the judgment shall provide for a refund of any costs paid by the claimant. In case of modification of such decision costs shall be awarded or refused

as justice may require. The decision of the Board made after the hearing provided herein shall become final in the same manner that decisions of the Board of Tax Appeals become final under section 640 of Title 26. June 22, 1936, 9:00 p. m., c. 690, § 906, 49 Stat. 1748."

"§ 651. Limitations on review.

"In the absence of fraud or mistake in mathematical calculation, the findings of fact and conclusions of law of the Commissioner upon the merits of any claim presented under sections 644 to 659 of this title shall not be subject to review by any other administrative or accounting officer, employee, or agent of the United States. June 22, 1936, 9:00 p. m., c. 690, § 909, 49 Stat. 1753."

The Sugar Act of 1937

(7 USCA 1115 (b) (c) (d) (e) (f))

"§ 1115. Allotments of quotas or prorations—Authorization; method; modification.

* * * * *

"(b) Appeal to courts; grounds. An appeal may be taken, in the manner hereinafter provided, from any decision making such allotments, or revision thereof, to the United States Court of Appeals for the District of Columbia in any of the following cases:

"(1) By any applicant for an allotment whose application shall have been denied.

"(2) By any person aggrieved by reason of any decision of the Secretary granting or revising any allotment made to him.

"(c) Same; initial procedure. Such appeal shall be taken by filing with said court within twenty days after the decision complained of is effective, notice in writing of said appeal and a statement of the reasons therefor, together with proof of service of a true copy of said notice and statement upon the Secretary. Unless a later date is specified by the Secretary as part of his decision, the decision complained of shall be considered to be effective as of the date on which public announcement of the decision is made at the office of the Secretary in the city of Washington. The Secretary shall thereupon, and in any event not later than ten days from the date of such service upon him, mail or otherwise deliver a copy of said notice of appeal to each person shown by the records of the Secretary to be interested in such appeal and to have a right to intervene therein under the provisions of this section, and shall at all times thereafter permit any such person to inspect and make copies of appellants' reasons for said appeal at the office of the Secretary in the city of Washington. Within thirty days after the filing of said appeal the Secretary shall file with the court the originals or certified copies of all papers and evidence presented to him upon the hearing involved and also a like copy of his decision thereon and shall within thirty days thereafter file a full statement in writing of the facts and grounds for his decision as found and given by him and a list of all interested persons to whom he has mailed or otherwise delivered a copy of said notice of appeal.

"(d) Same; intervention. Within thirty days after the filing of said appeal any interested person may intervene and participate in the proceedings had upon said appeal by filing with the court a notice of intention to

intervene and a verified statement showing the nature of the interest of such party together with proof of service of true copies of said notice and statement, both upon the appellant and upon the Secretary. Any person who would be aggrieved or whose interests would be adversely affected by reversal or modification of the decision of the Secretary complained of shall be considered an interested party.

“(e) Same; hearing; review. At the earliest convenient time the court shall hear and determine the appeal upon the record before it, and shall have power, upon such record, to enter a judgment affirming or reversing the decision, and if it enters an order reversing the decision of the Secretary it shall remand the case to the Secretary to carry out the judgment of the court: *Provided, however,* That the review by the court shall be limited to questions of law and that findings of fact by the Secretary, if supported by substantial evidence, shall be conclusive unless it shall clearly appear that the findings of the Secretary are arbitrary or capricious. The court's judgment shall be final, subject, however, to review by the Supreme Court of the United States, upon writ of certiorari on petition therefor, under section 347 of Title 28, as amended, by appellant, by the Secretary, or by any interested party intervening in the appeal.

“(f) Same; costs. The court may, in its discretion, enter judgment for costs in favor of or against an appellant, and other interested parties intervening in said appeal, but not against the Secretary, depending upon the nature of the issues involved in such appeal and the outcome thereof.”

The Agricultural Adjustment Act of 1938

(7 USCA 1365, 1366, 1367)

“§ 1365. Institution of proceeding for court review of committee findings.

“If the farmer is dissatisfied with the determination of the review committee, he may, within fifteen days after a notice of such determination is mailed to him by registered mail, file a bill in equity against the review committee as defendant in the United States district court, or institute proceedings for review in any court of record of the State having general jurisdiction, sitting in the county or the district in which his farm is located, for the purpose of obtaining a review of such determination. Bond shall be given in an amount and with surety satisfactory to the court to secure the United States for the costs of the proceeding. The bill of complaint in such proceeding may be served by delivering a copy thereof to any one of the members of the review committee. Thereupon the review committee shall certify and file in the court a transcript of the record upon which the determination complained of was made, together with its findings of fact. Feb. 16, 1938, 3 p. m., c. 30, Title III, § 365, 52 Stat. 63.

“§ 1366. Court review.

“The review by the court shall be limited to questions of law, and the findings of fact by the review committee, if supported by evidence, shall be conclusive. If application is made to the court for leave to adduce additional evidence, and it is shown to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the hearing before the review committee,

the court may direct such additional evidence to be taken before the review committee in such manner and upon such terms and conditions as to the court may seem proper. The review committee may modify its findings of fact or its determination by reason of the additional evidence so taken, and it shall file with the court such modified findings or determination, which findings of fact shall be conclusive. At the earliest convenient time, the court, in term time or vacation, shall hear and determine the case upon the original record of the hearing before the review committee, and upon such record as supplemented if supplemented, by further hearing before the review committee pursuant to direction of the court. The court shall affirm the review committee's determination, or modified determination, if the court determines that the same is in accordance with law. If the court determines that such determination or modified determination is not in accordance with law, the court shall remand the proceeding to the review committee with direction either to make such determination as the court shall determine to be in accordance with law or to take such further proceedings as, in the court's opinion, the law requires. Feb. 16, 1938, 3 p. m., c. 30, Title III, § 366, 52 Stat. 63.

"§ 1367. Stay of proceedings and exclusive jurisdiction.

"The commencement of judicial proceedings under this Part shall not, unless specifically ordered by the court, operate as a stay of the review committee's determination. Notwithstanding any other provision of law, the jurisdiction conferred by this Part to review the legal validity of a determination made by a review committee pursuant to this Part shall be exclusive. No court of the United States or of any State shall have jurisdiction to pass upon the legal validity of any such determination except in a proceeding under this Part. Feb. 16, 1938, 3 p. m., c. 30, Title III, § 367, 52 Stat. 64."

The Federal Seed Act (1939)

(7 USCA 1600, 1601)

"§ 1600. Appeal to circuit court of appeals.

"An order made under section 1599 shall be final and conclusive unless within thirty days after the service the person appeals to the circuit court of appeals for the circuit in which such person resides or has his principal place of business by filing with the clerk of such court a written petition praying that the Secretary's order be set aside or modified in the manner stated in the petition, together with a bond in such sum as the court may determine, conditioned that such person will pay the costs of the proceedings if the court so directs.

"The clerk of the court shall immediately cause a copy of the petition to be delivered to the Secretary, and the Secretary shall forthwith prepare, certify, and file in the court a full and accurate transcript of the record in such proceedings, including the complaint, the evidence, and the report and order. If before such transcript is filed, the Secretary amends or sets aside his report or order, in whole or in part, the petitioner may amend the petition within such time as the court may determine, on notice to the Secretary.

"At any time after such transcript is filed the court, on application of the Secretary, may issue a temporary injunction restraining, to the extent it deems proper, the person and his officers, directors, agents, and employees from violating any of the provisions of the order pending the final determination of the appeal.

"The evidence so taken or admitted, duly certified and filed as aforesaid as a part of the record, shall be considered by the court as the evidence in the case. The proceedings in such cases in the circuit court of appeals shall be made a preferred cause and shall be expedited in every way.

"The court may affirm, modify, or set aside the order of the Secretary.

"If the court determines that the just and proper disposition of the case requires the taking of additional evidence, the court shall order the hearing to be reopened for the taking of such evidence, in such manner and upon such terms and conditions as the court may deem proper. The Secretary may modify his findings as to the facts, or make new findings, by reason of the additional evidence so taken, and he shall file such modified or new findings and his recommendations, if any, for the modification or setting aside of his order, with the return of such additional evidence.

"If the circuit court of appeals affirms or modifies the order of the Secretary, its decree shall operate as an injunction to restrain the person and his officers, directors, agents, and employees from violating the provisions of such order or such order as modified. Aug. 9, 1939, c. 615, Title IV, § 410, 53 Stat. 1287.

"§ 1601. Enforcement of order.

"If any person against whom an order is issued under section 1599 fails to obey the order, the Secretary of Agriculture, or the United States, by its Attorney General, may apply to the circuit court of appeals of the United States, within the circuit where the person against whom the order was issued resides or has his principal place of business, for the enforcement of the order, and shall certify and file with its application a full and accurate transcript of the record in such proceedings, including the complaint, the evidence, the report, and the order. Upon such filing of the application and transcript the court shall cause notice thereof to be served upon the person against whom the order was issued. The evidence to be considered, the procedure to be followed, and the jurisdiction of the court shall be the same as provided in section 1600 for applications to set aside or modify orders.

"The proceedings in such cases shall be made a preferred cause and shall be expedited in every way. Aug. 9, 1939, c. 615, Title IV, § 411, 53 Stat. 1288."

The Federal Food, Drug and Cosmetic Act

(21 USCA 355 (h), 371 (f))

"§ 355. New drugs.

* * * * *

"(h) Appeal from order. An appeal may be taken by the applicant from an order of the Secretary refusing to permit the application to become effective, or suspending the effectiveness of the application. Such appeal

shall be taken by filing in the district court of the United States within any district wherein such applicant resides or has his principal place of business, or in the District Court of the United States for the District of Columbia, within sixty days after the entry of such order, a written petition praying that the order of the Secretary be set aside. A copy of such petition shall be forthwith served upon the Secretary, or upon any officer designated by him for that purpose, and thereupon the Secretary shall certify and file in the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm or set aside such order. No objection to the order of the Secretary shall be considered by the court unless such objection shall have been urged before the Secretary or unless there were reasonable grounds for failure so to do. The finding of the Secretary as to the facts, if supported by substantial evidence, shall be conclusive. If any person shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceeding before the Secretary, the court may order such additional evidence to be taken before the Secretary and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Secretary may modify his findings as to the facts by reason of the additional evidence so taken, and he shall file with the court such modified findings which, if supported by substantial evidence, shall be conclusive, and his recommendation, if any, for the setting aside of the original order. The judgment and decree of the court affirming or setting aside any such order of the Secretary shall be final, subject to review as provided in sections 225, 346, and 347 of Title 28, as amended, and in section 7, as amended, of the Act entitled 'An Act to establish a Court of Appeals for the District of Columbia', approved February 9, 1893 [c. 74, 27 Stat. 435] (D. C. Code, title 18, sec. 26). The commencement of proceedings under this subsection shall not, unless specifically ordered by the court to the contrary, operate as a stay of the Secretary's order."

“§ 371. Regulations and hearings.

* * * * *

“(f) Review of order. (1) In a case of actual controversy as to the validity of any order under subsection (e), any person who will be adversely affected by such order if placed in effect may at any time prior to the ninetieth day after such order is issued file a petition with the Circuit Court of Appeals of the United States for the circuit wherein such person resides or has his principal place of business, for a judicial review of such order. The summons and petition may be served at any place in the United States. The Secretary, promptly upon service of the summons and petition, shall certify and file in the court the transcript of the proceedings and the record on which the Secretary based his order.

“(2) If the petitioner applies to the court for leave to adduce additional evidence, and shows to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to

adduce such evidence in the proceeding before the Secretary, the court may order such additional evidence (and evidence in rebuttal thereof) to be taken before the Secretary, and to be adduced upon the hearing, in such manner and upon such terms and conditions as to the court may seem proper. The Secretary may modify his findings as to the facts, or make new findings, by reason of the additional evidence so taken, and he shall file such modified or new findings, and his recommendation, if any, for the modification or setting aside of his original order, with the return of such additional evidence.

"(3) The court shall have jurisdiction to affirm the order, or to set it aside in whole or in part, temporarily or permanently. If the order of the Secretary refuses to issue, amend, or repeal a regulation and such order is not in accordance with law the court shall by its judgment order the Secretary to take action, with respect to such regulation, in accordance with law. The findings of the Secretary as to the facts, if supported by substantial evidence, shall be conclusive.

"(4) The judgment of the court affirming or setting aside, in whole or in part, any such order of the Secretary shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 346 and 347 of Title 28, as amended.

"(5) Any action instituted under this subsection shall survive notwithstanding any change in the person occupying the office of Secretary or any vacancy in such office.

"(6) The remedies provided for in this subsection shall be in addition to and not in substitution for any other remedies provided by law."

§ 851. Secretary of the Interior.

The Bituminous Coal Act of 1937

(15 USCA 836 (b) (c) (d))

"§ 836. Review of rules, regulations and orders—Review by Commission of rule of district board; arbitration of disputes.

* * * * *

"(b) Court review of order of Commission. Any person aggrieved by an order issued by the Commission in a proceeding to which such person is a party may obtain a review of such order in the Circuit Court of Appeals of the United States, within any circuit wherein such person resides or has his principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the entry of such order, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall be forthwith served upon any member of the Commission and thereupon the Commission shall certify and file in the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, and enforce or set aside such order, in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged below. The finding of the Commission as to the facts, if supported by substantial evidence, shall be con-

clusive. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the hearing before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts, by reason of the additional evidence so taken, and it shall file such modified or new findings, which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, and enforcing or setting aside, in whole or in part, any such order of the Commission shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 346 and 347 of Title 28.

"The commencement of proceedings under this subsection shall not, unless specifically ordered by the court, operate as a stay of the Commission's order.

"(c) **Enforcement of orders by application to court.** If any code member fails or neglects to obey any order of the Commission while the same is in effect, the Commission in its discretion may apply to the Circuit Court of Appeals of the United States within any circuit where such code member resides or carries on business, for the enforcement of its order, and shall certify and file with its application a transcript of the entire record in the proceeding, including all the testimony taken and the report and order of the Commission. Upon such filing of the application and transcript the Court shall cause notice thereof to be served upon such code member and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree affirming, modifying, or setting aside the order of the Commission. The findings of the Commission as to facts, if supported by substantial evidence, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper.

"The Commission may modify its findings as to the facts or make new findings, by reason of the additional evidence so taken, and it shall file such modified or new findings, which if supported by substantial evidence shall be conclusive, and its recommendation, if any, for the modification or setting aside of its original order, with the return of such additional evidence. The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari or certification as provided in sections 346 and 347 of Title 28.

"(d) **Jurisdiction of courts.** The jurisdiction of the Circuit Court of Appeals of the United States or the United States Court of Appeals for the District of Columbia, as the case may be, to enforce, set aside, or modify

orders of the Commission shall be exclusive. April 26, 1937, c. 127, § 6, 50 Stat. 85."

§ 852. Secretary of Labor.

Public Contracts

(The Walsh-Healey Act, 41 USCA 39)

"§ 39. Same; hearings by Secretary of Labor; witness fees; failure to obey orders; punishment.

"Upon his own motion or on application of any person affected by any ruling of any agency of the United States in relation to any proposal or contract involving any of the provisions of sections 35 to 45 of this title, and on complaint of a breach or violation of any representation or stipulation as herein provided, the Secretary of Labor, or an impartial representative designated by him, shall have the power to hold hearings and to issue orders requiring the attendance and testimony of witnesses and the production of evidence under oath. Witnesses shall be paid the same fees and mileage that are paid witnesses in the courts of the United States. In case of contumacy, failure, or refusal of any person to obey such an order, any District Court of the United States or of any Territory or possession, or the Supreme Court of the District of Columbia, within the jurisdiction of which the inquiry is carried on, or within the jurisdiction of which said person who is guilty of contumacy, failure, or refusal is found, or resides or transacts business, upon the application by the Secretary of Labor or representative designated by him, shall have jurisdiction to issue to such person an order requiring such person to appear before him or representative designated by him, to produce evidence if, as, and when so ordered, and to give testimony relating to the matter under investigation or in question; and any failure to obey such order of the court may be punished by said court as a contempt thereof; and shall make findings of fact after notice and hearing, which findings shall be conclusive upon all agencies of the United States, and if supported by the preponderance of the evidence, shall be conclusive in any court of the United States; and the Secretary of Labor or authorized representative shall have the power, and is hereby authorized, to make such decisions, based upon findings of fact, as are deemed to be necessary to enforce the provisions of sections 35 to 45 of this title. (June 30, 1936, c. 881, § 5, 49 Stat. 2038.)"

§ 853. Secretary of War.

The Bridge Act of 1906, as amended

(33 USCA 505, 520)

"§ 505. Same; review of order.

"Any order issued under section 504 of this title may be reviewed by the Court of Appeals of the District of Columbia, or the circuit court of appeals for any judicial circuit in which the bridge in question is wholly or

partly located, if a petition for such review is filed within three months after the date such order was issued. The judgment of any such court shall be final, except that it shall be subject to review by the Supreme Court of the United States upon certiorari, in the manner provided in section 347 of Title 28. The review by such courts shall be limited to questions of law, and the findings of fact by the Secretary of War, if supported by substantial evidence, shall be conclusive. Upon such review, such courts shall have power to affirm or, if the order its [is] not in accordance with law, to modify or to reverse the order, with or without remanding the case for a rehearing as justice may require. (Aug. 21, 1935, c. 597, § 3, 49 Stat. 671.)"

"§ 520. Review of findings and orders.

"Any order made or issued under section 516 of this title may be reviewed by the circuit court of appeals for any judicial circuit in which the bridge in question is wholly or partly located, if a petition for such review is filed within three months after the date such order is issued. The judgment of any such court shall be final except that it shall be subject to review by the Supreme Court of the United States upon certification or certiorari, in the manner provided in sections 346 and 347 of Title 28, as amended. The review by such Court shall be limited to questions of law, and the findings of fact by the Secretary, if supported by substantial evidence, shall be conclusive. Upon such review, such Court shall have power to affirm or, if the order is not in accordance with law, to modify or to reverse the order, with or without remanding the case for a rehearing as justice may require. Proceedings under this section shall not operate as a stay of any order of the Secretary issued under provisions of this sub-chapter other than section 516 of this title, or relieve any bridge owner of any liability or penalty under such provisions. June 21, 1940, c. 409, § 10, 54 Stat. 501."

§ 854. Securities and Exchange Commission.

The Securities Act of 1933

(15 USCA 77i)

"§ 77i. Court review of orders.

"(a) Any person aggrieved by an order of the Commission may obtain a review of such order in the Circuit Court of Appeals of the United States, within any circuit wherein such person resides or has his principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the entry of such order, a written petition praying that the order of the Commission be modified or be set aside in whole or in part. A copy of such petition shall be forthwith served upon the Commission, and thereupon the Commission shall certify and file in the court a transcript of the record upon which the order complained of was entered. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission. The finding of the Commission as to the facts, if supported by evidence, shall be conclusive. If either party shall apply to the court

for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the hearing before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file such modified or new findings, which, if supported by evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The jurisdiction of the court shall be exclusive and its judgment and decree, affirming, modifying, or setting aside, in whole or in part, any order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 346 and 347 of Title 28.

“(b) The commencement of proceedings under subsection (a) shall not, unless specifically ordered by the court, operate as a stay of the Commission’s order. May 27, 1933, c. 38, Title I, § 9, 48 Stat. 80, June 7, 1934, c. 426, 48 Stat. 926.”

The Securities Exchange Act of 1934

(15 USCA 78y)

“§ 78y. Court review of orders.

“(a) Any person aggrieved by an order issued by the Commission in a proceeding under this chapter to which such person is a party may obtain a review of such order in the Circuit Court of Appeals of the United States, within any circuit wherein such person resides or has his principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the entry of such order, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall be forthwith served upon any member of the Commission, and thereupon the Commission shall certify and file in the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, and enforce or set aside such order, in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the hearing before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts, by reason of the additional evidence so

taken, and it shall file such modified or new findings, which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, and enforcing or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 346 and 347 of Title 28.

"(b) The commencement of proceedings under subsection (a) shall not, unless specifically ordered by the court, operate as a stay of the Commission's order. (June 6, 1934, c. 404, § 25, 48 Stat. 901; June 7, 1934, c. 426, 48 Stat. 926.)"

The Public Utility Holding Company Act of 1935

(15 USCA 79x)

"§ 79x. Court review of orders.

"(a) Any person or party aggrieved by an order issued by the Commission under this chapter may obtain a review of such order in the circuit court of appeals of the United States within any circuit wherein such person resides or has his principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the entry of such order, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall be forthwith served upon any member of the Commission, or upon any officer thereof designated by the Commission for that purpose, and thereupon the Commission shall certify and file in the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order, in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission or unless there were reasonable grounds for failure so to do. The findings of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If application is made to the court for leave to adduce additional evidence, and it is shown to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceeding before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court affirming, modifying, or setting aside, in whole or in part, any such order of the Commission shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 346 and 347 of Title 28.

"(b) The commencement of proceedings under subsection (a) shall not,

unless specifically ordered by the court, operate as a stay of the Commission's order. (Aug. 26, 1935, c. 687, Title I, § 24, 49 Stat. 834.)"

The Investment Company Act of 1940
(15 USCA 80a-42)

"§ 80a-42. Court review of orders.

"(a) Any person or party aggrieved by an order issued by the Commission under this subchapter and sections 72(a), last sentence, and 107(f) of Title 11 may obtain a review of such order in the circuit court of appeals of the United States within any circuit wherein such person resides or has his principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the entry of such order, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall be forthwith served upon any member of the Commission, or upon any officer thereof designated by the Commission for that purpose, and thereupon the Commission shall certify and file in the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order, in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission or unless there were reasonable grounds for failure so to do. The findings of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If application is made to the court for leave to adduce additional evidence, and it is shown to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceeding before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court affirming, modifying, or setting aside, in whole or in part, any such order of the Commission shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 346 and 347 of Title 28, as amended.

"(b) The commencement of proceedings under subsection (a) to review an order of the Commission issued under section 80a-8 (e) shall operate as a stay of the Commission's order unless the court otherwise orders. The commencement of proceedings under subsection (a) to review an order of the Commission issued under any provision of this subchapter and sections 72 (a), last sentence, and 107 (f) of Title 11 other than section 80a-8 (e) of this subchapter shall not operate as a stay of the Commission's order unless the court specifically so orders. Aug. 22, 1940, c. 686, Title 1, § 43, 54 Stat. 844."

The Investment Advisers Act of 1940

(15 USCA 80b-13)

"§ 80b-13. Court review of orders.

"(a) Any person or party aggrieved by an order issued by the Commission under this subchapter may obtain a review of such order in the circuit court of appeals of the United States within any circuit wherein such person resides or has his principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the entry of such order, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall be forthwith served upon any member of the Commission, or upon any officer thereof designated by the Commission for that purpose, and thereupon the Commission shall certify and file in the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order, in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission or unless there were reasonable grounds for failure so to do. The findings of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If application is made to the court for leave to adduce additional evidence, and it is shown to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceeding before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court affirming, modifying, or setting aside, in whole or in part, any such order of the Commission shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 346 and 347 of Title 28, as amended.

"(b) The commencement of proceedings under subsection (a) shall not, unless specifically ordered by the court, operate as a stay of the Commission's order. Aug. 22, 1940, c. 686, Title II, § 213, 54 Stat. 855."

§ 855. Selective Service Boards.

The Selective Training and Service Act of 1940

(50 USCA (App.) 310 (a) (1) (2))

"§ 310. Administrative provisions.

"(a) The President is authorized—

"(1) To prescribe the necessary rules and regulations to carry out the provisions of this Act;

"(2) To create and establish a Selective Service System, and shall provide for the classification of registrants and of persons who volunteer for induction under this Act on the basis of availability for training and service, and shall establish within the Selective Service System civilian local boards and such other civilian agencies, including appeal boards and agencies of appeal, as may be necessary to carry out the provisions of this Act. There shall be created one or more local boards in each county or political subdivision corresponding thereto of each State, Territory and the District of Columbia. Each local board shall consist of three or more members to be appointed by the President, from recommendations made by the respective Governors or comparable executive officials. No member of any such local board shall be a member of the land or naval forces of the United States, but each member of any such local board shall be a civilian who is a citizen of the United States residing in the county or political subdivision corresponding thereto in which such local board has jurisdiction under rules and regulations prescribed by the President. Such local boards, under rules and regulations prescribed by the President, shall have power within their respective jurisdictions to hear and determine, subject to the right of appeal to the appeal boards herein authorized, all questions or claims with respect to inclusion for, or exemption or deferment from, training and service under this Act of all individuals within the jurisdiction of such local boards. The decisions of such local boards shall be final except where an appeal is authorized in accordance with such rules and regulations as the President may prescribe. Appeal boards and agencies of appeal within the Selective Service System shall be composed of civilians who are citizens of the United States. No person who is an officer, member, agent, or employee of the Selective Service System, or of any such local or appeal board or other agency, shall be excepted from registration, or deferred from training and service, as provided for in this Act, by reason of his status as such officer, member, agent, or employee;"

§ 856. Social Security Board.

The Social Security Act

(42 USCA 405 (g) (h))

"§ 405. Evidence, procedure, and certification for payment.

* * * * *

"(g) Any individual, after any final decision of the Board made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Board may allow. Such action shall be brought in the district court of the United States for the judicial district in which the plaintiff resides, or has his principal place of business, or, if he does not reside or have his principal place of business within any such judicial district, in the District Court of the United States for the District of Columbia. As part of its answer the Board shall file a certified copy of the transcript of the record including the evidence upon which the findings and decision com-

plained of are based. The court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Board, with or without remanding the cause for a rehearing. The findings of the Board as to any fact, if supported by substantial evidence, shall be conclusive, and where a claim has been denied by the Board or a decision is rendered under subsection (b) hereof which is adverse to an individual who was a party to the hearing before the Board, because of failure of the claimant or such individual to submit proof in conformity with any regulation prescribed under subsection (a) hereof, the court shall review only the question of conformity with such regulations and the validity of such regulations. The court shall, on motion of the Board made before it files its answer, remand the case to the Board for further action by the Board, and may, at any time, on good cause shown, order additional evidence to be taken before the Board, and the Board shall, after the case is remanded, and after hearing such additional evidence if so ordered, modify or affirm its findings of fact or its decision, or both, and shall file with the court any such additional and modified findings of fact and decision, and a transcript of the additional record and testimony upon which its action in modifying or affirming was based. Such additional or modified findings of fact and decision shall be reviewable only to the extent provided for review of the original findings of fact and decision. The judgment of the court shall be final except that it shall be subject to review in the same manner as a judgment in other civil actions.

"(h) The findings and decision of the Board after a hearing shall be binding upon all individuals who were parties to such hearing. No findings of fact or decision of the Board shall be reviewed by any person, tribunal, or governmental agency except as herein provided. No action against the United States, the Board, or any officer or employee thereof shall be brought under section 41 of Title 28 to recover on any claim arising under sections 401-409 of this chapter."

§ 857. United States Customs Court.

(28 USCA 308)

"§ 308. (Judicial Code, section 195, amended.) **Review of decisions of United States Customs Court.** The Court of Customs and Patent Appeals shall exercise exclusive appellate jurisdiction to review by appeal, as herein provided, final decisions by the United States Customs Court in all cases as to the construction of the law and the facts respecting the classification of merchandise and the rate of duty imposed thereon under such classifications, and the fees and charges connected therewith, and all appealable questions as to the jurisdiction of said court, and all appealable questions as to the laws and regulations governing the collection of the customs revenues; and the judgments and decrees of said Court of Customs and Patent Appeals shall be final in all such cases: *Provided, however,* That in any case in which the judgment or decree of the Court of Customs and Patent Appeals is made final by the provisions of this title, it shall be competent for the Supreme Court, upon the application of either party, duly made as required by section 350 of this title, to require, by certiorari or otherwise, such case

to be certified to the Supreme Court for its review and determination, with the same power and authority in the case as if it had been carried by appeal or writ of error to the Supreme Court: *And provided further*, That the first proviso of this section shall not apply to any case involving only the construction of section 1, or any portion thereof, of an Act entitled 'An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes,' approved August 5, 1909 (Thirty-sixth Statutes, page 11), nor to any case involving the construction of section 2 of an Act entitled 'An Act to promote reciprocal trade relations with the Dominion of Canada, and for other purposes,' approved July 26, 1911 (Thirty-seventh Statutes, page 11). (Aug. 5, 1909, c. 6, § 29, 36 Stat. 106; Mar. 3, 1911, c. 231, § 195, 36 Stat. 1145; Aug. 22, 1914, c. 267, 38 Stat. 703; Sept. 6, 1916, c. 448, § 6, 39 Stat. 727; Feb. 13, 1925, c. 229, § 8, 43 Stat. 940; May 28, 1926, c. 411, § 1, 44 Stat. 669; Jan. 31, 1928, c. 14, § 1, 45 Stat. 1475; Mar. 2, 1929, c. 488, § 1, 45 Stat. 1475; June 17, 1930, c. 497, Title IV, § 647, 46 Stat. 762.)"

**§ 858. United States Employees' Compensation Commission:
Deputy Commissioners.**

Longshoremen's and Harbor Workers' Compensation Act
(33 USCA 918, 921, 921a)

"§ 918. Collection of defaulted payments. In case of default by the employer in the payment of compensation due under any award of compensation for a period of thirty days after the compensation is due and payable, the person to whom such compensation is payable may, within one year after such default, make application to the deputy commissioner making the compensation order or a supplementary order declaring the amount of the default. After investigation, notice, and hearing, as provided in section 919 of this chapter, the deputy commissioner shall make a supplementary order, declaring the amount of the default, which shall be filed in the same manner as the compensation order. In case the payment in default is an installment of the award, the deputy commissioner may, in his discretion, declare the whole of the award as the amount in default. The applicant may file a certified copy of such supplementary order with the clerk of the Federal district court for the judicial district in which the employer has his principal place of business or maintains an office, or for the judicial district in which the injury occurred. In case such principal place of business or office or place where the injury occurred is in the District of Columbia, a copy of such supplementary order may be filed with the clerk of the district court of the United States for the District of Columbia. Such supplementary order of the deputy commissioner shall be final, and the court shall upon the filing of the copy enter judgment for the amount declared in default by the supplementary order if such supplementary order is in accordance with law. Review of the judgment so entered may be had as in civil suits for damages at common law. Final proceedings to execute the judgment may be had by writ of execution in the form used by the court in suits at common law in actions of assumpsit. No fee shall be required

for filing the supplementary order nor for entry of judgment thereon, and the applicant shall not be liable for costs in a proceeding for review of the judgment unless the court shall otherwise direct. The court shall modify such judgment to conform to any later compensation order upon presentation of a certified copy thereof to the court. (Mar. 4, 1927, c. 509, § 18, 44 Stat. 1434, as amended June 25, 1936, c. 804, 49 Stat. 1921.)"

"§ 921. Review of compensation orders. (a) A compensation order shall become effective when filed in the office of the deputy commissioner as provided in section 919 of this chapter, and, unless proceedings for the suspension or setting aside of such order are instituted as provided in subdivision (b) of this section, shall become final at the expiration of the thirtieth day thereafter.

"(b) If not in accordance with law, a compensation order may be suspended or set aside, in whole or in part, through injunction proceedings, mandatory or otherwise, brought by any party in interest against the deputy commissioner making the order, and instituted in the Federal district court for the judicial district in which the injury occurred (or in the district court of the United States for the District of Columbia if the injury occurred in the District). The orders, writs, and processes of the court in such proceedings may run, be served, and be returnable anywhere in the United States. The payment of the amounts required by an award shall not be stayed pending final decision in any such proceeding unless upon application for an interlocutory injunction the court, on hearing, after not less than three days' notice to the parties in interest and the deputy commissioner, allows the stay of such payments, in whole or in part, where irreparable damage would otherwise ensue to the employer. The order of the court allowing any such stay shall contain a specific finding, based upon evidence submitted to the court and identified by reference thereto, that such irreparable damage would result to the employer, and specifying the nature of the damage.

"(c) If any employer or his officers or agents fails to comply with a compensation order making an award, that has become final, any beneficiary of such award or the deputy commissioner making the order, may apply for the enforcement of the order to the Federal district court for the judicial district in which the injury occurred (or to the district court of the United States for the District of Columbia if the injury occurred in the District). If the court determines that the order was made and served in accordance with law, and that such employer or his officers or agents have failed to comply therewith, the court shall enforce obedience to the order by writ of injunction or by other proper process, mandatory or otherwise, to enjoin upon such person and his officers and agents compliance with the order.

"(d) Proceedings for suspending, setting aside, or enforcing a compensation order, whether rejecting a claim or making an award, shall not be instituted otherwise than as provided in this section and section 918 of this chapter. Mar. 4, 1927, c. 509, § 21, 44 Stat. 1436, as amended June 25, 1936, c. 804, 49 Stat. 1921."

"§ 921a. Appearance of United States district attorney for Commission or deputy commissioner. In any court proceedings under section 921 of this title or other provisions of this chapter, it shall be the duty of the district

attorney of the United States in the judicial district in which the case is pending to appear as attorney or counsel on behalf of the United States Employees' Compensation Commission or its deputy commissioner when either is a party to the case or interested, and to represent such commission or deputy in any court in which such case may be carried on appeal. (May 4, 1928, c. 502, 45 Stat. 490.)"

§ 859. United States Maritime Commission.

The Shipping Act of 1916, as amended

(46 USCA 829, 830)

"§ 829. Violation of orders of Commission for payment of money. In case of violation of any order of the commission for the payment of money the person to whom such award was made may file in the district court for the district in which such person resides, or in which is located any office of the carrier or other person to whom the order was directed, or in which is located any point of call on a regular route operated by the carrier, or in any court of general jurisdiction of a State, Territory, District, or possession of the United States having jurisdiction of the parties, a petition or suit setting forth briefly the causes for which he claims damages and the order of the commission in the premises.

"In the district court the findings and order of the commission shall be prima facie evidence of the facts therein stated, and the petitioner shall not be liable for costs, nor shall he be liable for costs at any subsequent stage of the proceedings unless they accrue upon his appeal. If a petitioner in a district court finally prevails, he shall be allowed a reasonable attorney's fee, to be taxed and collected as part of the costs of the suit.

"All parties in whose favor the commission has made an award of reparation by a single order may be joined as plaintiffs, and all other parties to such order may be joined as defendants, in a single suit in any district in which any one such plaintiff could maintain a suit against any one such defendant. Service of process against any such defendant not found in that district may be made in any district in which is located any office of, or point of call on a regular route operated by, such defendant. Judgment may be entered in favor of any plaintiff against the defendant liable to that plaintiff.

"No petition or suit for the enforcement of an order for the payment of money shall be maintained unless filed within one year from the date of the order. (Sept. 7, 1916, c. 451, § 30, 39 Stat. 737.)"

"§ 830. Venue and procedure in suits to enforce, suspend, or set aside orders. The venue and procedure in the courts of the United States in suits brought to enforce, suspend, or set aside, in whole or in part, any order of the commission shall, except as otherwise provided, be the same as in similar suits in regard to orders of the Interstate Commerce Commission, but such suits may also be maintained in any district court having jurisdiction of the parties. (Sept. 7, 1916, c. 451, § 31, 39 Stat. 738.)"

§ 860. United States Tariff Commission.

The Tariff Act of 1930

(19 USCA 1337 (c) (d) (e))

"§ 1337. Unfair practices in import trade—Unfair methods of competition declared unlawful.

* * * * *

"(c) **Hearings and review.** The commission shall make such investigation under and in accordance with such rules as it may promulgate and give such notice and afford such hearing, and when deemed proper by the commission such rehearing, with opportunity to offer evidence, oral or written, as it may deem sufficient for a full presentation of the facts involved in such investigation. The testimony in every such investigation shall be reduced to writing, and a transcript thereof with the findings and recommendation of the commission shall be the official record of the proceedings and findings in the case, and in any case where the findings in such investigation show a violation of this section, a copy of the findings shall be promptly mailed or delivered to the importer or consignee of such articles. Such findings, if supported by evidence, shall be conclusive, except that a rehearing may be granted by the commission and except that, within such time after said findings are made and in such manner as appeals may be taken from decisions of the United States Customs Court, an appeal may be taken from said findings upon a question or questions of law only to the United States Court of Customs and Patent Appeals by the importer or consignee of such articles. If it shall be shown to the satisfaction of said court that further evidence should be taken, and that there were reasonable grounds for the failure to adduce such evidence in the proceedings before the commission, said court may order such additional evidence to be taken before the commission in such manner and upon such terms and conditions as to the court may seem proper. The commission may modify its findings as to the facts or make new findings by reason of additional evidence, which, if supported by evidence, shall be conclusive as to the facts except that within such time and in such manner an appeal may be taken as aforesaid upon a question or questions of law only. The judgment of said court shall be final.

"(d) **Transmission of findings to President.** The final findings of the commission shall be transmitted with the record to the President.

"(e) **Exclusion of articles from entry.** Whenever the existence of any such unfair method or act shall be established to the satisfaction of the President he shall direct that the articles concerned in such unfair methods or acts, imported by any person violating the provisions of this chapter, shall be excluded from entry into the United States, and upon information of such action by the President, the Secretary of the Treasury shall, through the proper officers, refuse such entry. The decision of the President shall be conclusive."

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APPEAL FROM DECISION OF THE FEDERAL COMMUNICATIONS COMMISSION UNDER 47 USCA 402 (b)

I. NOTICE OF APPEAL

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INTRODUCTORY

When a suit for judicial review is contemplated, the first step should be a study of the specific statutory provisions relating to review of orders of the particular agency. The second step should be to consult the rules of the particular reviewing Court, especially if this is to be a Circuit Court of Appeals or the Court of Appeals for the District of Columbia. Recently adopted court rules contain special, detailed provisions for the conduct of judicial review litigation.

The facts in such suits are nearly always complex; most courts are not especially familiar with this type of litigation; and practical devices which provide a presentation of the issues that can be readily understood by a fresh mind are usually essential to success and will always be appreciated by the courts.

Although theoretically it is *nisi prius* litigation, a suit for judicial review primarily resembles the conduct of an appeal except where a trial *de novo* is had. Hence complaints in judicial review litigation ordinarily contain five separate types of allegation, (1) jurisdictional statements with statutory references showing the nature of the suit and that it falls within the jurisdiction of a particular court; (2) statements as to parties and venue; (3) a concise summary of the administrative proceedings, no longer than necessary, to be valuable as background and a foundation for the legal issues; (4) specifications of error raising the issues of law on which judicial review is sought; and (5) the relief desired.

A detailed recital of the administrative proceedings only tends to confuse the legal issues and should be avoided, unless procedural due process is involved. The full details of the administrative proceedings are contained in

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the certified administrative record which is usually introduced later as an exhibit. However, the principal administrative documents, such as the agency's report and order providing the subject of litigation, should be affixed to the complaint as exhibits. Additional printed or mimeographed copies of reports and orders of administrative agencies can usually be obtained from the particular agency for use as exhibits, and sometimes for insertion in records on appeal.

The legal issues should be raised by categorical specifications of error, with argument being reserved for the briefs except to the extent necessary to make contentions in a particular case clear as a matter of exposition.

A complaint such as the one described above with the important administrative documents affixed as exhibits should serve the purpose of simplified presentation. It is the practice of most agencies to admit by answer all the substantially accurate factual allegations of the complaint and to deny the specifications of error. Consequently a complaint telling a clear story with accurate allegations which are for the most part admitted and to which the important administrative documents are annexed as exhibits, will provide a reliable set of papers containing the substance of the controversy.

The philosophy of extended simplicity in pleading introduced by the Federal Rules of Civil Procedure should also be borne in mind.

The following forms are added, not to serve as a general practice manual, but to provide the essential factors for drawing papers in judicial review litigation.

CAPTIONS

I. FOR DISTRICT COURTS

A. WHERE DEFENDANT IS A FEDERAL AGENCY

Form No. 1

United States District Court
Southern District of New York

Aeme Manufacturing Corporation,

Plaintiff

v.

United States of America (and the
Interstate Commerce Commission),²

Defendants.

Civil Action
No. —
Complaint¹

¹ Statutes such as the Urgent Deficiencies Act, 28 USCA 43-48, which denominate the first pleading "petition," are modified by Rule 7 of the Federal Rules of Civil Procedure, which provides in substance that the first pleading is the "complaint."

² The Interstate Commerce Commission is not a necessary party, but ordinarily requests leave to intervene. Hence it is usually simpler to join it as a party at the outset. See § 633 et seq.

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B. WHERE DEFENDANT IS A STATE AGENCY

Form No. 2

United States District Court
Southern District of California

Los Angeles Gas & Electric Corporation,³
Plaintiff

v.

Railroad Commission of the State of California and C. L. Seavey, Leon O. Whitsell, Thomas S. Louttit, W. J. Carr, and Ezra W. Decoto, as Members of and Constituting said Railroad Commission of the State of California,

Defendants.

Civil Action
No. —
Complaint

II. FOR CIRCUIT COURTS OF APPEAL

Form No. 3

United States Circuit Court of Appeals
for the Second Circuit

Aeme Manufacturing Corporation,

Petitioner

v.

Securities and Exchange Commission,
Respondent.

Petition for Review
(or: Petition⁴ for
Enforcement)

COMPLAINTS

I. JURISDICTIONAL STATEMENTS

A. FOR DISTRICT COURTS

1. To Review a Federal Administrative Order

a. Under the Urgent Deficiencies Act⁵

Form No. 4

A. This suit is brought under the Urgent Deficiencies Act of October 22, 1913, 28 USCA 43-48, to suspend, enjoin, annul and set aside the order of the Interstate Commerce Commission (or other agency to which the Act applies) hereinafter described.

B. (Add at end) The plaintiff has no adequate remedy at law.

b. Under General Equity Jurisdiction⁶

Form No. 5

A. This is a suit in equity, of a civil nature, arising under the laws of the United States, relating to an Act of Congress regulating interstate com-

³ Adapted from Los Angeles Gas & Electric Corp. v. Railroad Commission (1933) 289 U. S. 287, 77 L. Ed. 1180, 53 S. Ct. 637.

⁴ Rule 36(1) of the Rules of the

Circuit Court of Appeals for the Seventh Circuit requires the denomination "application for enforcement."

⁵ See § 633 et seq.

⁶ See § 650 et seq.

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merce, to wit: the Bituminous Coal Act of 1937 (15 USCA 828-851) (*or other law of Congress*). It presents and involves an actual controversy between plaintiffs and defendants, and the matter in controversy as to each plaintiff, exclusive of interest and costs, exceeds the sum of \$3,000. This suit is brought under the general equity jurisdiction of this court, 28 USCA 41(1), to enjoin and restrain enforcement of and to set aside and annul the order (*or determination*) of the National Bituminous Coal Commission (*or other federal agency*) hereinafter described.

B. Plaintiffs bring this suit to prevent irreparable injury and damage to them and to their business and property used by them in the production and sale of bituminous coal in interstate and intrastate commerce, and to prevent and restrain the defendants, and each of them and their agents and persons acting for them, from the threatened disclosure by the defendants of the cost data and realization prices which the plaintiffs and each of them have heretofore filed with the Commission under the provisions of the Bituminous Coal Act of 1937, which provisions, as will hereinafter be shown, impose on the defendants the duty to treat in confidence and keep secure such cost data and realization prices as the private property of plaintiffs.

C. The plaintiffs' knowledge of their cost of doing business and of their sales realization is their own valuable and private property, subject to be used and enjoyed by themselves alone. Plaintiffs have at all times zealously and successfully protected information of this character against disclosure to other persons who might thereupon either as consumers or as competitors, or potential competitors, of plaintiffs be able to convert such information to their own uses and advantage, and to the prejudice and disadvantage of plaintiffs. Said cost data and realization prices is confidential information, in the nature of a trade secret and the valuable property of plaintiffs, of which they may not be deprived without their consent which plaintiffs have not given.

D. The immediate and proximate effect of the threatened disclosure by the defendants and their agents of the cost data and sales realization prices of plaintiff, will be to make available such information and other private data of plaintiffs to their competitors and consumers of coal, which will cause plaintiffs irreparable injury and damage, in that it will destroy plaintiffs' property right in the information contained in such reports, and will lay open such information to plaintiffs' competitors, and others, for such use, profit, advantage and enjoyment as they may derive therefrom without limitation whatsoever. The use, profit and enjoyment which plaintiffs' competitors and consumers shall derive from such reports and information will naturally and inevitably result in great prejudice to plaintiffs and in irreparable injury to them in the conduct of their business as producers of coal. If said private information of plaintiffs is made available to the public for inspection, as defendants threaten to do, plaintiffs will suffer irreparable injury because *inter alia* customers, with the knowledge of plaintiffs' costs thus acquired, would demand lower prices; since certainty of continuous supply of coal is a factor in the purchase of coal, and since coal mines, which have a low cost of production, are considered by customers to be most likely to supply coal continuously, the coal producer which has low costs of production would secure business which would otherwise go to the producer with a higher cost of production and this would cause a loss or transfer of business from producer to producer, and from district to district; low cost producers would

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be able to underbid high cost producers, and the credit standing of high cost producers would be impaired, thus making it difficult for them to borrow money; no protection would be afforded to plaintiffs even if the information as to their costs be published without their names being shown, since competitors and others could readily identify the producer by a comparison of the tonnage on the cost sheets with that published by the Bureau of Mines and other organizations.⁷

E. (*Add at end:*) The plaintiff has no adequate remedy at law.

2. To Review a State Administrative Order⁸

Form No. 6

A. The jurisdiction of this court depends upon subsection (14) of section 41 of Title 28 of the United States Code, which provides for suits to redress the deprivation under color of any law, statute, ordinance, regulation, custom or usage of any State, of any right, privilege or immunity secured by the Constitution of the United States, and upon subsection (1) of said section 41, which provides for suits arising under the Constitution of the United States. The amount in controversy, exclusive of interest and costs, exceeds the sum or value of Three Thousand Dollars (\$3,000). This suit is brought for an interlocutory⁹ and permanent injunction enjoining and restraining enforcement of the order of California Railroad Commission (*or other state agency*) hereinafter described.⁹

B. (*Add at end*) The plaintiff has no adequate remedy at law and (*where necessary to comply with the Johnson Act*¹⁰) no plain, speedy and efficient remedy in the courts of the State of California.

3. To Restrain a Criminal Prosecution¹¹

Form No. 7

A. This is a suit in equity of a civil nature arising under the laws of the United States relating to an act of Congress regulating Interstate Commerce, to wit, the Railway Labor Act (45 USCA 151-163), and presents an actual controversy between the plaintiff and the defendant. The matter in controversy as to the plaintiff, exclusive of interest and costs, exceeds the sum of \$3,000, as will be hereinafter more particularly alleged.

B. Plaintiff brings this suit to prevent irreparable injury and damage to it and its business and property used in the transportation of persons and property and to prevent and restrain the defendant individually and in his official capacity from the threatened enforcement of fines and penalties against the plaintiff and its officers and agents, for alleged violation of any

⁷ Adapted from *Utah Fuel Co. v. National Bituminous Coal Commission* (1939) 306 U. S. 56, 83 L. Ed. 483, 59 S. Ct. 483.

⁸ See § 672 et seq.

⁹ Adapted from *Los Angeles Gas &*

Electric Corp. v. Railroad Commission (1933) 289 U. S. 287, 77 L. Ed. 1180, 53 S. Ct. 637.

¹⁰ See § 671.

¹¹ See § 686.

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of the provisions of the Railway Labor Act, and for any alleged failure or refusal on their part respectively to conform to the provisions of said Act.

C. (*After setting out the facts of the railroad system:*) Plaintiff is an electric interurban railway as said term is used in and within the purview of said Railway Labor Act. It is not operated as part of a general steam railroad system of transportation, none of its stock or securities are owned by any general steam railroad system of transportation and no general railroad system of transportation, and no steam railroad company, nor any of its officers or agents, have any control of or voice in its management or operation, and plaintiff is exempt from any and all provisions of said Railway Labor Act.

D. In said Railway Labor Act certain omissions and acts of commission on the part of the carrier subject thereto, its agents and officers, are made penal offenses, involving heavy fines or imprisonment or both.

E. By section 4, First, of the Railway Labor Act, (45 USCA 154, First) there is created a board known as the National Mediation Board, which is given certain powers and duties in connection with the administration of said Act. Among such duties and powers is the duty to prescribe the form of notice to carrier employees as set out in section 2, Eighth, thereof (45 USCA 152, Eighth). The National Mediation Board has heretofore prescribed the form of notice provided for in the eighth paragraph of section 2 of the Act and ordered that it be posted as therein specified, thereby demanding that all plaintiff's employees be thereby notified that all disputes between the carrier and them will be handled in accordance with the provisions of the said Act. The plaintiff has not complied with said order, and if plaintiff continues to fail to comply with said order, and otherwise fails to comply with the provisions of said Act so applied, it will subject itself to prosecutions for the penalties hereinbefore set out notwithstanding that as an interurban electric railway, it is not subject to the provisions thereof.

F. Dan B. Shields, United States Attorney for the District of Utah, is charged by law with the enforcement of said Act and with the duty of filing suits and prosecuting plaintiff and its officers and agents, under the direction of the Attorney General, for violation of said paragraph of said section of the Act. Said defendant has threatened to file suit and prosecute plaintiff and its officers and agents for failure on the part of the plaintiff to comply with the Railway Labor Act, and unless the relief herein prayed for is granted, he will do so. Under the circumstances herein alleged, plaintiff is without an adequate remedy at law and is entitled as of right to immunity from the severe and cumulative penalties pending an orderly and judicial test of the application of said Act to plaintiff, and those particular portions thereof aforesaid and the question of whether or not it is subject to the provisions of said Act. In order that such test may be initiated and determined judicially, it should be protected against any prosecution or prosecutions for violation of said penal provisions of said Act or any of them, pending such judicial determination.¹²

¹² Adapted from *Shields v. Utah Idaho C. R. Co.* (1938) 305 U. S. 177, 83 L. Ed. 111, 59 S. Ct. 160.

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B. FOR CIRCUIT COURTS OF APPEAL

Form No. 8 (Enforcement)

A. This suit is brought under section 10 (e) of the National Labor Relations Board Act, 29 USCA 160 (e), for enforcement of the order of the National Labor Relations Board hereinafter described.

Form No. 9 (Review)

A. This suit is brought under section 10 (f) of the National Labor Relations Board Act (29 USCA 160 (f)) to review the order of the National Labor Relations Board (or: the Securities and Exchange Commission, Federal Trade Commission, etc., with appropriate statutory references) hereinafter described.

Form No. 10 (NLRB Cases)

B. (Where necessary, as under sections 10 (e) and 10 (f) of the National Labor Relations Act, 29 USCA 160 (e) (f)—*Unfair Labor Practices*) The alleged unfair labor practices complained of in said proceedings before the Board were alleged to have been committed at Petitioner's Indiana Harbor and Chicago Heights plants. Said plants are located in the Seventh Judicial Circuit of the United States and within the jurisdiction of this court.¹³

II. STATEMENTS AS TO PARTIES AND VENUE¹⁴

A. PLAINTIFFS

Form No. 11

G. The plaintiff, George Allison & Co., Inc., is a corporation duly organized and existing under the laws of the State of New York with its principal place of business at No. 296 Washington Street, New York, N. Y. (*Set forth similar allegations for any other plaintiffs*).

H. Plaintiffs are engaged in the wholesale fruit and vegetable business and at all times hereinafter mentioned were shippers and receivers of fresh strawberries transported by express in carload lots from Florida to northern points, who paid the express and refrigeration charges thereon.¹⁵

B. DEFENDANTS

Form No. 12

(*Respecting federal agencies created or established by Act of Congress such as "Interstate Commerce Commission," "Securities and Exchange Commission," or "Henry A. Wallace, Secretary of Agriculture" etc., judi-*

¹³ Adapted from *Inland Steel Co. v. National Labor Relations Board* (C. C. A. 7th, 1940) 109 F. (2d) 9.

¹⁴ See the following Rules of Circuit Courts of Appeal: CCA 3, Rule 20; CCA 6, Rule 15(1); CCA 7, Rule 36(1).

¹⁵ Adapted from *George Allison & Co., Inc. v. Interstate Commerce Commission* (1939) 70 App. D. C. 375, 107 F. (2d) 180, cert. den. (1940) 309 U. S. 656, 84 L. Ed. 1005, 60 S. Ct. 470.

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cial notice is taken of the agency's identity and functions, and no descriptive allegation respecting it is necessary. If a state agency is involved, the members thereof being named individually, allege substantially as follows:)

A. The Railroad Commission of the State of California, one¹⁶ of the defendants herein (hereinafter called the Commission), is the administrative board of the State of California administering the regulatory powers over public utilities conferred upon it by the Constitution of the State of California, and by an Act of the Legislature of that State known as the "Public Utilities Act" (Statute 1911 Ex. Sess., Chapter 14, page 18, Re-enacted 1915, Statute 1915, Chapter 91, page 115, as amended). Under the Constitution and said Public Utilities Act it is made the duty of said Commission to enforce the provisions thereof affecting public utilities and the imposition and collection of penalties thereunder. The said Commission consists, and at the time of the making of the administrative order hereinafter described, did consist, of the individual defendants duly qualified as the members thereof.¹⁷

B. The said Commission has its principal place of business at No. — Olive Street, Los Angeles, California. The residences of the individual defendants are as follows (*state place of residence for each individual defendant*).

III. SUMMARY OF ADMINISTRATIVE PROCEEDINGS¹⁸

Form No. 13

A. The plaintiffs herein were complainants or interveners in support of complaints filed with the Interstate Commerce Commission between December 21, 1930 and August 15, 1931, being parties in interest in Interstate Commerce Commission Dockets 24145 and 24671, which complaints were directed, among other things, against the express rates and refrigeration charges on carload shipments of strawberries from Florida to northern destinations instituted by carriers on December 1, 1929 and entered in schedules filed by them with the said Commission. Said complaints alleged that such express rates and refrigeration charges were unreasonable, unjustly discriminatory, unduly prejudicial and constituted violations of sections 1 and 3 of the Interstate Commerce Commission Act (49 USCA 1, 3), and prayed that said Commission determine just and reasonable express rates and refrigeration charges for the period beginning December 1, 1929 and for the future,

¹⁶ See Form No. 2.

¹⁷ Adapted from *Los Angeles Gas & Electric Corp. v. Railroad Commission* (1933) 289 U. S. 287, 77 L. Ed. 1180, 53 S. Ct. 637.

¹⁸ A summary of the administrative proceedings is not essential, especially where the validity of administrative procedure is not involved. For instance in *International Art Co. v. Fed-*

eral Trade Commission (C. C. A. 7th, 1940) 109 F. (2d) 393, the sole allegation relating thereto was that "on or about December 16, 1938, the said Federal Trade Commission entered and issued a cease and desist order against your petitioners, a copy of which is hereto attached and made a part hereof as Exhibit A."

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and that the said Commission award reparation on said shipments moving since December 1, 1929 and during the pendency of the proceedings.

B. Said complaints came on for hearing on June 16 and 17, 1931, July 16, 1931 and December 11, 1931, before Examiners duly appointed and acting for said Commission, who took certain testimony and received certain exhibits, said hearings being closed on December 11, 1931.

C. Said Examiners submitted a proposed report to the said Commission, exceptions thereto were duly filed by complainants and defendants alike, and oral argument thereon was had before the Honorable Commissioners Lewis, Farrell and Tate constituting Division 5 of the Interstate Commerce Commission.

D. On or about December 30, 1932 said Division 5 filed and published its report thereon under Docket 23972, caption R. W. Burch, Inc., et al. v. Railway Express Agency, Inc., et al., 190 I. C. C. 520, a copy of which Report is hereto attached marked Exhibit "A" and made a part hereof, which report embraces Dockets 24145 and 24671, and in which report said Division 5 did state, among other things:

"2. That the assailed rates on fresh strawberries, in earloads, in express service, under refrigeration, under through billing from points in Florida to destinations in trunk-line territory, including the Buffalo-Pittsburgh zone, and in New England territory were, are, and for the future will be unreasonable to the extent that they have exceeded or may exceed 120 per cent of first-class freight rates from and to the same points constructed in accordance with findings 17-b, 17-d, and 17-f in the third supplemental report in Southern Class Rate Investigation, 128 I. C. C. 567, 599, earload minimum 17,000 pounds.

"3. That the charges for standard refrigeration of fresh strawberries, in earloads, in express service, from points in Florida to destinations designated in the foregoing two findings are not shown to be unreasonable or otherwise unlawful. * * *

"8. That complainants in Nos. 23972, 24145, and 24671 made shipments as described and paid and bore the charges thereon at the rates and charges herein found unreasonable; that they were damaged thereby in the respective amounts of the differences between the charges paid and those which would have accrued at the rates and charges herein found reasonable; and that they are entitled to reparation in those amounts, with interest. They should comply with Rule V of the Rules of Practice. The statements filed may list shipments made during the pendency of these proceedings, if accompanied by proof in affidavit form that complainants made such shipments and paid and bore the charges thereon. If defendants object to proof in that manner a further hearing may be requested."

E. The rates and charges so prescribed by Division 5 were ordered into effect on or before April 20, 1933 as more fully shown by the order of said Division, a copy of which is hereto attached, marked Exhibit "B" and made a part hereof.

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F. Upon petition to the full Commission for rehearing, which petition was granted by said full Commission on April 3, 1933, the entire proceedings were reopened for rehearing, reargument and reconsideration upon the said record, oral argument was had on June 14, 1933 before the said full Commission, which on or about November 7, 1933 did make, file and publish its report also known as *R. W. Burch, Inc., et al. v. Railway Express Agency, Inc., et al.*, 197 I. C. C. 85, which report embraces the several proceedings hereinbefore mentioned and is hereto annexed, marked Exhibit "C" and made a part hereof, and in which report the said full Commission did state, among other things:

"2. That prior to March 3, 1933, the assailed rates on fresh strawberries, in carloads, in express service, under refrigeration, under through billing, from points in Florida to destinations in trunk-line territory, including the Buffalo-Pittsburgh district, and in New England territory were unreasonable to the extent that they exceeded 120 per cent of first-class freight rates from and to the same points constructed in accordance with findings 17-b, 17-d, and 17-f in the third supplemental report in Southern Class Rate Investigation, 128 I. C. C. 567, 599, carload minimum 17,000 pounds; and that such rates are and for the future will be unreasonable to the extent that they exceed or may exceed 105 per cent of first-class rates constructed in the same manner."

G. The express rates and refrigeration charges prescribed by the full Commission were ordered into effect on or before December 28, 1933, as more fully shown by the order of the said full Commission dated November 7, 1933, a copy of which is hereto attached marked Exhibit "D" and made a part hereof.

H. Thereafter and on December 7, 1933, complainants petitioned the full Commission for rehearing upon the ground¹⁹ that in substance the Commission had purported to fix for the period from December 1, 1929, to November 7, 1933, express rates on the basis of 120 per cent. of existing first-class freight rates, arbitrarily and illegally having stated in its own report upon the said record that it was the fact that such rates were unreasonably high, unduly discriminatory and unduly prejudicial and having condemned the 120 per cent. basis found by Division 5; that the said findings and order of the full Commission purporting to fix the aforesaid rates on the 120 per cent. basis prior to March 3, 1933, were made without any evidence to support them, were arbitrary and illegal and violated the plaintiff's rights. Said petition for rehearing was in all respects denied by the said full Commission by order dated January 2, 1934.²⁰

¹⁹ Unless there is particular point in stating the ground of a petition for rehearing, it should suffice to recite the fact of its filing and denial. See § 245.

²⁰ Adapted from *George Allison &*

Co., Inc. v. Interstate Commerce Commission (1939) 70 App. D. C. 375, 107 F. (2d) 180, cert. den. (1940) 309 U. S. 656, 84 L. Ed. 1005, 60 S. Ct. 470.

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IV. SPECIFICATIONS OF ERROR²¹

A. ON CONSTITUTIONAL QUESTIONS

1. Questions of Constitutional Power: Jurisdictional Fact Cases²²

Form No. 14 (Workmen's Compensation: Employer-Employee Relationship)

A. On the 4th day of July, 1927, the said J. B. Knudsen, while standing on a derrick barge belonging to this complainant and then moored in the Mobile River, was struck and seriously injured by certain tackle which fell or gave away by reason of the breaking of that portion of the wharf to which it was fastened, and thereafter on the 31st day of May, 1928, the said J. B. Knudsen filed with the said deputy commissioner a claim *(summarize administrative proceedings resulting in the filing of award and compensation order)*.

B. The said award and compensation order were beyond the constitutional powers of both Congress and the said deputy commissioner for the reason that constitutional jurisdiction of both Congress and the said deputy commissioner to impose liability upon plaintiff for the injury of said J. B. Knudsen depended upon the fact of employment by plaintiff of said J. B. Knudsen at the time of said injury, as indeed is provided in the Act, and at the time of said injury the said J. B. Knudsen was not an employee of the complainant.²³

Form No. 15 (Citizenship)²⁴

A. Your petitioner is a Chinese person, born in the United States of America, and is a citizen thereof, and is restrained of his liberty and detained by Thomas D'Arey, Chinese Inspector of the United States at Malone, New York, in what is known as the Detention House, an establishment jointly maintained by the United States Government and the Canadian Pacific Railroad, a foreign railroad corporation.

B. *(Put in summary of administrative proceedings emphasizing that the claim of citizenship was constantly made in these proceedings and supported by substantial evidence, and demonstrating that administrative remedies have been exhausted.)*

C. Your petitioner has been denied admission to the United States by the Chinese Inspector in charge of said detention house at Malone, New York, as appears by the administrative order of the Attorney General

²¹ See *Inland Steel Co. v. National Labor Relations Board* (C. C. A. 7th, 1940) 109 F. (2d) 9.

Other phrases of similar import include "assignments of error" (CCA Rules: Fourth Circuit, Rule 39(1); Fifth Circuit, Rule 38(1); Eighth Circuit, Rule 43(1); Ninth Circuit, Rule 36(1); Tenth Circuit, Rule 34(1), "points on which the petitioner in-

tends to rely" (Rule 20 of the Circuit Court of Appeals, Third Circuit), and "statement of points" (Rules 33(1), 34(1) and 36(1) of the Circuit Court of Appeals, Seventh Circuit).

²² See § 262 et seq.

²³ Adapted from *Crowell v. Benson* (1932) 285 U. S. 22, 76 L. Ed. 598, 52 S. Ct. 285.

²⁴ See § 400.

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denying him admission, dated October 13, 1941, (*or*: that a warrant for the deportation of your petitioner has been signed and issued by the Attorney General) a copy of which order (*or* warrant) is hereto attached, marked Exhibit "A," and made a part hereof.

D. Said Chinese Inspector (*and the higher administrative officers who have passed on the issues*) have no right or authority to pass upon the rights of your petitioner, but have only authority to pass upon the claims of aliens seeking to enter the United States, and said detention is illegal and without any authority of law whatever.²⁵

2. Questions of Constitutional Right

a. Denial of Procedural Due Process

(1) DENIAL OF RIGHT TO KNOW AND MEET OPPOSING CLAIMS²⁶

Form No. 16

A. The said Commission was the plaintiff's opponent in said administrative proceeding even though also endowed with adjudicatory functions. The said proceeding, initiated as a general inquiry, was nevertheless an adversary proceeding. However, the plaintiff was never apprised of the theory, claim or contention upon which said Commission as its said opponent sought to adduce its evidence, and it was not until after the Commission rendered its said report and order that the plaintiff learned the said Commission's claims as against the plaintiff. Not having been apprised of the Commission's claims or contentions the plaintiff's right to introduce evidence and argument before the Commission was worthless, plaintiff was denied a fair hearing and due process of law in the procedure of said Commission, and the resulting administrative determinations, findings and order cannot therefore be made effective without depriving plaintiff of its property without due process of law in violation of the Fifth (*or* Fourteenth) Amendment of the Constitution of the United States.

(2) DENIAL OF PRIVILEGE OF INTRODUCING EVIDENCE²⁷

Form No. 17

A. In refusing to receive said evidence which was relevant, competent and material to the issues in said administrative proceeding and vital to the plaintiff's position therein, the plaintiff was denied a fair hearing and due process of law in the procedure of said administrative agency, and the resulting administrative determinations, findings and order cannot therefore be made effective without depriving the plaintiff of its property without due process of law in violation of the Fifth (*or* Fourteenth) Amendment of the Constitution of the United States.

²⁵ Adapted from *United States v. Sing Tuck* (1904) 194 U. S. 161, 48 L. Ed. 917, 24 S. Ct. 621.

²⁶ Care should be taken that the summary of the administrative pro-

ceedings demonstrates a denial of the opportunity to know and meet opposing claims in the cumulative sense. See § 290 et seq.

²⁷ See § 303.

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(3) HEARING BY BIASED OFFICER²⁸

Form No. 18

A. Said order is erroneous and beyond the power of the Board and in contravention of the National Labor Relations Act and of the Constitution of the United States, and void and of no effect and should be annulled and set aside by this Honorable Court for the following reasons, to wit:

(1) The Board appointed as the Trial Examiner to hear the complaint one John Doe, who was prejudiced against petitioner and against petitioner's defense and was unable, by virtue of said prejudice and by virtue of his disposition and temperament, to accord to petitioner the full and fair hearing to which petitioner was entitled under section 10 (b) of the National Labor Relations Act and the Constitution of the United States.

(2) The hearing held before the Board's Trial Examiner as aforesaid was manifestly unfair and was inconsistent with the requirements of due process of law and did not constitute such a hearing as petitioner is entitled to under section 10 (b) of the National Labor Relations Act and the Fifth Amendment of the Constitution of the United States, in the following particulars:

(a) The Trial Examiner refused to rule upon petitioner's motion for leave to amend its answer (*Here refer to proper place in record; suggested references of this nature are hereinafter indicated merely by the abbreviation "R."*²⁹), which motion was timely made and for good cause, and rulings upon which were repeatedly requested by petitioner's counsel (R.).

(b) The Board refused to issue personal subpoenas to petitioner for the attendance of witnesses, except upon written application therefor, which application (except in one instance) was required to disclose the purpose of the testimony intended to be offered (R.) with the result, *inter alia*, that persons whom petitioner desired to call as witnesses were exposed to influences hostile to petitioner which affected the testimony they were willing to give in a manner adverse to petitioner, and persons whom petitioner called as witnesses were exposed to similar influences which affected the testimony given by them in a manner adverse to petitioner (R.), whereas the attorney for the Board had an unlimited supply of subpoenas which he was privileged to use or not, as he saw fit, without notice to petitioner as to what witnesses had been subpoenaed or the purpose of their testimony (R.).

(c) The Trial Examiner narrowly limited petitioner's cross-examination of the Board's witnesses to the precise subject matter of their direct examination (R.) whereas petitioner's witnesses were, over petitioner's objection, subjected to the most extensive and searching interrogation by the attorney for the Board and by the Trial Examiner, with respect to matters wholly unrelated to their direct testimony, all under the pretense of cross-examining said witnesses (R.).

²⁸ See § 309.

²⁹ Record references may be in-

serted in the complaint, but this is by no means essential.

APPENDIX B—FORMS

(d) The Trial Examiner throughout the hearing displayed animosity and hostility toward and prejudice against petitioner, petitioner's attorney and petitioner's witnesses, as evidenced by his repeated and unwarranted accusations of improper conduct on the part of counsel (R.), by his repeated and unwarranted accusations that counsel were suppressing evidence (R.), by his repeated and unwarranted accusations and insinuations that counsel or officials of petitioner were coaching, coercing or influencing witnesses (R.), by his repeated and unwarranted insinuations that petitioner and various witnesses called by petitioner had engaged in industrial espionage (R.), by his oppressive and unfair treatment of petitioner's witnesses (R.), and by his arrogant, hostile, abusive and contemptuous attitude toward many of petitioner's employee witnesses (R.).

(e) The Trial Examiner permitted the attorney for the Board to repeat questions addressed to petitioner's employee witnesses many times after the witness had given a responsive answer favorable to petitioner, in an attempt to induce the witness to change said answer, all over the objection of petitioner (R.); whereas during the cross-examination by attorneys for petitioner of witnesses called by the Board, objections made by the attorney for the Board on the ground that the question had already been asked and answered were invariably sustained (R.).

(f) During the examination of petitioner's employee witnesses the Trial Examiner, over the objection of petitioner, permitted in the hearing room large numbers of persons who, on information and belief, were members of the Steel Workers Organizing Committee and who displayed Steel Workers Organizing Committee membership buttons (R.) thereby intimidating petitioner's said witnesses and preventing them from testifying freely.

(g) The Trial Examiner throughout the hearing assisted the attorney for the Board in attempting to make a case in support of the charges contained in the complaint and, in effect, constituted himself an additional attorney for the Board (R.).

(h) The Trial Examiner erred in making rulings adverse to petitioner on matters other than the admission or rejection of evidence, e. g., improper restatement by the Trial Examiner on the record of what petitioner was required by the Trial Examiner to state off the record (R.), ejection of petitioner's court reporter (R.), refusal of petitioner's request that a witness be ordered to produce his C. I. O. card (R.), refusal to allow petitioner to conduct examination of a witness in the manner it desired (R.), refusal to allow petitioner to reply to statements of the Board's attorney except by off the record statements (R.), refusal to exclude from the court room large numbers of individuals wearing C. I. O. buttons, and refusal to order such individuals to remove their C. I. O. buttons (R.).³⁰

³⁰ Adapted from Inland Steel Co.
v. National Labor Relations Board
(C. C. A. 7th, 1940) 109 F. (2d) 9.

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(4) FAILURE TO HEAR BY DECIDING AGENCY ³¹

Form No. 19

A. Plaintiff has been denied the full and fair hearing required by the Packers and Stockyards Act of 1921 and the Constitution, and due process of law in the procedure of said agency, in that, by reason of the following matters, said agency had the duty of deciding the issues in said proceeding, yet decided said issues without hearing the evidence:

(a) Henry A. Wallace, the Secretary of Agriculture, who made and signed the order of June 14, 1933, herein was not personally present when any of the testimony herein was taken and did not hear any of said testimony given, nor, on information and belief, was such testimony, or any of it, read to or by him, either the testimony offered by the petitioner or by the defendants.

(b) All of the testimony taken in the administrative proceeding herein was heard by John C. Brooke, an examiner of the Department of Agriculture. The petitioner offered the testimony of sixty-six witnesses. The respondents offered the testimony of forty-four witnesses. As to the testimony of each one of these witnesses, the petitioner alleges on information and belief that the Secretary neither heard it nor read it, nor had it read to him, nor read or examined any fair or adequate abstract, analysis, or synopsis thereof.

(c) As to the testimony of each of the aforesaid witnesses, the petitioner alleges on information and belief that the Secretary did not examine or consider the same.

(d) As to the testimony of each of the aforesaid witnesses, the petitioner alleges on information and belief that the Secretary did not judicially appraise the same.

(e) In the course of the administrative hearings before Examiner Brooke, the petitioner introduced one hundred thirty exhibits and the respondents introduced three hundred eighty-six. Petitioner alleges on information and belief as to each of these exhibits that the Secretary did not read it, did not have it read to him, nor did he read any fair or adequate abstract, analysis, or synopsis thereof.

(f) As to each of said exhibits petitioner alleges on information and belief that the Secretary did not examine or consider the same.

(g) As to each of said exhibits petitioner alleges on information and belief that the Secretary did not judicially appraise the same.

(h) At the conclusion of said administrative hearings before said examiner, petitioner demanded that the Secretary personally hear oral argument on its behalf. The Secretary failed and refused to hear oral argument.

(i) On or about the 25th day of May 1933, petitioner submitted a brief on the law and facts involved in said administrative hearings with the demand that the Secretary read and consider the same. Petitioner alleges on information and belief that the Secretary failed and refused to read said brief.

³¹ See § 310.

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(j) Petitioner further alleges on information and belief that the Secretary did not read any fair or adequate abstract, analysis, or synopsis of said brief.

(k) Petitioner alleges on information and belief that the Secretary did not examine or consider said brief.

(l) Petitioner alleges on information and belief that the Secretary did not judicially appraise the arguments contained in said brief.

(m) At the conclusion of the administrative hearings before said examiner, petitioner demanded that a tentative report upon the evidence be prepared to which it might make exceptions prior to oral argument before the Secretary thereon. Petitioner's demand was refused and no tentative report was ever prepared.

(n) On information and belief, instead of personally considering the evidence and argument presented by petitioners and judicially appraising same, the said Secretary, without warrant or authority of law, delegated to one Rexford G. Tugwell, who purported to act in the premises as and in the place and stead of the Secretary of Agriculture, the powers and authority vested by law solely in the said Secretary, which powers and authority involved the exercise of legislative and judicial discretion and the determination of the issues with respect to the justice, reasonableness, and lawfulness of the rates and charges of this petitioner. Said purported appointment of said Tugwell as Acting Secretary of Agriculture to act in the place and stead of the said Secretary was unauthorized and illegal by reason of the fact that from the time he began to act until June 14, 1933, when the order herein was made, the said Secretary of Agriculture was in Washington, D. C., at his office in the Department of Agriculture, and at no time during said period was either sick, absent, or disabled from any other cause, in the performance of the official duties of Secretary of Agriculture.³²

(5) FAILURE TO DECIDE IN ACCORDANCE WITH EVIDENCE³³

Form No. 20

A. The Commission based its findings of value upon alleged material and labor cost prices and trends obtained from various sources without plaintiff's knowledge, and not offered or introduced in evidence in any open hearing or made a part of the record in this case and to which plaintiff never had access and as to which it had no opportunity, to cross-examine, explain or refute, as follows:

1. Cost prices for several years allegedly furnished by unidentified manufacturers of telephone equipment;

2. The trend of land values allegedly ascertained from an examination of tax valuations in certain of the large cities of Ohio, the names of which cities were undisclosed;

³² Adapted from the amended complaint in *Morgan v. United States* (1936) 298 U. S. 468, 80 L. Ed. 1288, 56 S. Ct. 906. Pertinent provisions of

the original complaint are set forth in 298 U. S., pages 474, 475.

³³ See § 314.

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3. Building cost trends taken from the Engineering News Record;
4. Labor cost trends from the same publication;
5. Other labor and material cost trends allegedly obtained from various undisclosed sources.

B. The Commission having fixed the fair value of plaintiff's property as of June 30, 1925, thereupon erroneously used the price trends obtained from the sources above referred to in fixing the fair value of plaintiff's intrastate property, for each of the years 1926 to 1933, both inclusive.

C. The alleged facts so considered did not come from any official source which the Commission had the right to notice judicially. They were not published by any public authority, governmental or state. They were not introduced in evidence, and plaintiff had no opportunity to examine or cross-examine as to such claimed proof or to explain or refute the same, or to show that such claimed price trends could not fairly be considered in determining the fair value of plaintiff's property. The Commission admittedly considered and gave controlling weight to such evidence not introduced in any hearing before it.

D. By reason of these facts the Commission denied plaintiff the fair hearing required by the Fourteenth (or Fifth) Amendment of the Constitution of the United States, and due process of law in the procedure of the Commission, with the result that the Commission's said order resulting therefrom and dependent upon said findings cannot be enforced without depriving plaintiff of its property without due process of law in violation of the Fourteenth (or Fifth) Amendment of the Constitution of the United States.³⁴

b. Confiscation³⁵

Form No. 21

A. As of December 31, 1932, the cost of the property of plaintiff in the State of Maryland, used and useful in furnishing its intrastate telephone service to the public and exclusively devoted to the rendition of that service, the cost of reproduction of said property less depreciation, and the fair and reasonable value of said property, respectively, are as follows:

Cost of said property of plaintiff (including working capital and excluding going value)	\$44,830,252
Cost of reproduction of said property (including working capital and going value)	\$47,363,233
Cost of reproduction of said property less depreciation (including working capital and going value)	\$41,829,532

³⁴ Adapted from Ohio Bell Telephone Co. v. Public Utilities Commission (1937) 301 U. S. 292, 81 L. Ed.

1093, 57 S. Ct. 724.

³⁵ See § 323 et seq.

APPENDIX B—FORMS

Fair and reasonable value of said
property (including working
capital and going value)
not less than

\$41,829,000

The foregoing statements of cost of reproduction, reproduction cost less depreciation, and of fair and reasonable value, include nothing on account of the item of franchises, but do include the item of going value, the amount attributed to such item of going value being not in excess of 9% of the cost of reproduction, of 10.4% of the cost of reproduction less depreciation, and of 10.4% of the present fair and reasonable value of said property.

The foregoing statement of cost of said property to the plaintiff includes nothing on account of any item of franchises or the item of going value.

Said cost to plaintiff of its property used and useful in its intrastate telephone business in the State of Maryland has been diminished since December 31, 1932, during the periods hereinafter mentioned, by the following amounts, being the net excess, during such periods respectively, of property removed from service over additional property acquired, viz.:

January 1 to June 30, 1933, inclusive (net reduction)	\$112,495
January 1 to October 31, 1933, inclusive (net reduction)	\$ 24,557
January 1 to December 31, 1933, inclusive (net reduction) (Partly Estimated.)	\$ 821

B. The plaintiff's net earnings derived from its intrastate telephone business within the State of Maryland, under its existing rates, stated as a per cent. annual return upon the fair and reasonable value of its property used and useful in furnishing said service and exclusively devoted to the rendering thereof, have been not in excess of the amounts and percentages set forth below. Said fair and reasonable value of plaintiff's property averaged over the yearly period set forth below, is not less than the amounts there set forth for said respective yearly periods, and is based on the fair and reasonable value of plaintiff's property as of December 31, 1932, from which have been deducted the amounts of net reductions of plaintiff's property, average for said respective period aforesaid:

	Year 1932	12 months ended June 30, 1933	Year 1933 (Adjusted)
Net earnings (depreciation allowance based on value)	\$ 2,391,785	\$ 2,222,984	\$ 2,082,080
Value (averaged)	41,830,000	41,825,000	41,763,000
Per cent. return, not in excess of	5.8%	5.4%	5.0%

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C. The plaintiff's net earnings derived from its intrastate telephone business within the State of Maryland, under its existing rates, stated as a rate per cent. annual return upon the cost to plaintiff of its property used and useful in furnishing said service and exclusively devoted to the rendition thereof, have not been in excess of the amounts and percentages set forth below. Said cost of plaintiff's property is not less than the amounts set forth for the respective yearly periods, having been similarly averaged for such respective periods:

	Year 1932	12 months ended June 30, 1933	Year 1933 (Adjusted)
Net earnings (depreciation allowance based on cost)	\$ 2,316,729	\$ 2,152,144	\$ 2,017,884
Investment Cost	44,832,023	44,826,494	44,764,596
Per cent. return, not in excess of	5.2%	4.9%	4.6%

D. The telephone business of plaintiff within the State of Maryland has been conducted efficiently and economically during all the times herein referred to and is now being so conducted.

E. The fair annual rate of return which the plaintiff is entitled to earn under rates imposed upon it by public authority is an amount equal to not less than 7½% upon the fair and reasonable value of its property used and useful in the rendition of the service covered by the rates in question, and upon any rate base computed from such fair and reasonable value.

F. The rates of plaintiff for telephone service, heretofore established and now in force and effect, are not more than just and reasonable rates, and are not yielding to plaintiff in excess of a fair return.

G. Plaintiff's net earnings derived from its intrastate telephone business within the State of Maryland, by said order of November 28, 1933, here complained of, are intended to be and will be reduced by not less than the sum of \$1,000,000 per annum. Said order will not permit plaintiff to earn a fair return upon the fair and reasonable value of its property within the State of Maryland, used and useful in furnishing to the public its intrastate telephone service and exclusively devoted to the rendition of that service. Said order is therefore unlawful and confiscatory in effect and is therefore null and void, and the same if enforced would deprive plaintiff of its property without due process of law, and deny to the plaintiff the equal protection of the laws, in violation of its rights under the provisions of the Fourteenth Amendment of the Constitution of the United States.

H. If said order is enforced and plaintiff is compelled to charge rates and make charges in compliance therewith, plaintiff, though practicing all reasonable economy consistent with adequate and efficient service to the public, will be prevented from earning any return in excess of 2.6% per annum upon the fair and reasonable value of its property in the State of Maryland used and useful in furnishing to the public its intrastate telephone service, and exclusively devoted to the rendition of that service, and from earning any return in excess of 2.3% per annum upon the cost of said property.

APPENDIX B—FORMS

I. Unless the defendants are restrained and enjoined as herein prayed, they will attempt to compel the plaintiff to comply with said order No. 24065, dated November 28, 1933, of the said Public Service Commission, and in the event of noncompliance with it will attempt to enforce the penalties prescribed by the laws of the State of Maryland, and the plaintiff, its directors, officers, agents and employees will be compelled to file amended schedules of rates and charges, as in said order provided, and will be deterred and prevented by the threat of said penalties from charging lawful rates and from charging any rates other than rates which will reduce the plaintiff's gross revenues by \$1,200,000; and thereby the plaintiff will be forced to submit to the confiscation of its property without due process of law and in violation of its rights under the Constitution of the United States, as heretofore alleged, and will be subjected to great and irreparable loss and damage.³⁶

c. Administrative Discrimination: Denial of Equal Protection³⁷

Form No. 22

A. Your petitioner is the owner of certain coal land situate in the Township of Cumberland in said County, which was assessed by the Assessor of said Township in the fall of 1927 and returned to the Commissioners of said County, which coal as so assessed is shown in Exhibit "A" hereto attached and made a part hereof.

B. Your petitioner duly appealed from the action of the said Assessor to the Board of Commissioners sitting as a Board of Appeal for the Revision and Equalization of Assessments, and said Board on or about May 14, 1928, over the objection of your petitioner, adjusted the valuation of all the Pittsburgh vein of coal (except what is termed "active coal") in said Township at \$260 per acre, which said valuation applied to your petitioner's said property as appears in the transcript of assessments in the Commissioners' office as shown by Exhibit "B" hereto attached and made a part hereof.

C. Said Assessors and Commissioners have systematically and intentionally discriminated against your petitioner in favor of the owners of other property of the same class within said county by assessing the coal of your petitioner at a higher relative rate, to wit, one hundred per cent of its value, than the other classes of real estate, which are assessed at not to exceed thirty per cent of its value, and as a result of such administrative discrimination the said coal of your petitioner will be required to pay an unjust, unfair and undue proportion of the taxes applicable generally to all real estate in said county and township, thereby denying your petitioner the equal protection of the laws and due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.³⁸

³⁶ Adapted from *West v. Chesapeake & Potomac Telephone Co.* (1935) 295 U. S. 662, 79 L. Ed. 1640, 55 S. Ct. 894.

³⁷ See § 401 et seq.

³⁸ Adapted from *Cumberland Coal Co. v. Board of Revision* (1931) 284 U. S. 23, 76 L. Ed. 146, 52 S. Ct. 48. Administrative discrimination cases usually arise in state courts.

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B. ON JUDICIAL QUESTIONS³⁹

Form No. 23

A. In extending the benefits of the Act to said individuals as "employees" within the meaning of the Act (*or in making any other legal error*) the said Commission misconstrued and misapprehended the Act and exceeded its statutory powers.

Form No. 24

A. In attaching said conditions to said order, the said Commission exceeded its statutory powers under the Act, in that the Interstate Commerce Act does not confer power upon the said Commission to approve or authorize a lease except in accordance with the policies laid down in said Act, none of which relate to said conditions.⁴⁰

Form No. 25 (In Mandamus Cases)

A. The Commission having found reparation due but having declined to order payment thereof, is under a ministerial duty to make and enter an order in Dockets 24145 and 24671 which shall direct payment by the defendants in said dockets to the plaintiffs herein as complainants in said dockets of all moneys paid by the plaintiffs herein as express charges on shipments moving between March 3, 1933 and December 28, 1933 in excess of 105 per cent. of the then applicable first-class freight rates, with interest at the rate of 6 per cent. per annum from the dates said charges were paid.⁴¹

Form No. 26

A. The said Commission is under ministerial duty to take jurisdiction of the said complaint and to proceed to determine the issues therein in accordance with its duties under the Act.⁴²

Form No. 27

A. The Commission is under a ministerial duty to receive said evidence excluded by it.⁴³

C. ON ADMINISTRATIVE QUESTIONS

1. *Lack of Ultimate Findings*⁴⁴

Form No. 28

A. In requiring the plaintiff by said order to equip its locomotives with power-operated reverse gears in substitution for hand-operated reverse gears, the said Commission failed to make the quasi-jurisdictional findings of fact necessary to empower it to require the plaintiff to take such action. The Commission is empowered under the Act to direct that such action be taken only upon the basis of a finding of fact by the Commission to the effect

³⁹ See § 424 et seq.

⁴⁰ See *United States v. Lowden*
(1939) 308 U. S. 225, 84 L. Ed. 208,
60 S. Ct. 248.

⁴¹ See § 688.

⁴² See § 695.

⁴³ See § 696.

⁴⁴ See § 550 et seq.

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that hand-operated reverse gears cause unnecessary peril to life and limb, and no such finding has been made. The said order of the Commission therefore transcends its constitutional and statutory powers and is unlawful, void and of no effect.

Form No. 29 (A More Elaborate Form)

A. The order is illegal, arbitrary and beyond the power of the Commission, and hence void, because it is devoid of essential findings of fact. The complaint alleges that all manually operated reverse gears are unsuitable and unsafe, and that a locomotive equipped with a gear cannot be operated in the service to which the same is put without unnecessary peril to life or limb, and on the basis of this allegation prays that the order of the Commission shall require power reverse gears, or other devices, to be placed upon all of these locomotives which are now equipped with manually operated reverse gears in order that said locomotives may be placed in a safe and suitable condition for operation in compliance with the Boiler Inspection Act. An essential finding of fact to support an order pursuant to such a complaint would be that all locomotives equipped with manually operated reverse gears are, because of that fact, unsafe and unsuitable for operation in the service to which the same are put, and incapable of being operated without unnecessary peril to life and limb. The order of the Commission contains no such finding as to all locomotives equipped with manually operated reverse gears, and it contains no finding with respect to any one or more of such locomotives. That the Commission was of the opinion that the manually operated reverse gear is not an inherently unsuitable and unsafe device, and hence it could not make the finding above suggested, definitely appears from the Commission's order which permits continued operation of approximately one-half of all locomotives now equipped with manually operated reverse gears.⁴⁵

2. Lack of Basic Findings⁴⁶

Form No. 30

A. The statement in the report of the said full Commission to the effect that express rates were reasonable on the 120 per cent. basis up to November 7, 1933 is a mere conclusion insufficient as a finding because it is not supported by basic findings of constitutive facts particularly stated. (If possible add a second sentence as follows: On the contrary, basic findings in the Commission's said report affirmatively show that said express rates were unreasonable insofar as they exceeded the 105 per cent. basis for the entire period from December 1, 1929 to November 7, 1933.) The Commission's said order is therefore not based on a valid quasi-jurisdictional finding, exceeds the Commission's constitutional and statutory powers, is arbitrary, and is void and of no effect; and cannot be given effect without depriving plaintiff of its property without due process of law in violation

⁴⁵ Adapted from *United States v. Baltimore & O. R. Co.* (1935) 293 U. S. 454, 79 L. Ed. 587, 55 S. Ct. 268.

⁴⁶ See § 564 et seq.

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of the Fifth (or Fourteenth) Amendment to the Constitution of the United States.⁴⁷

3. Lack of Substantial Evidence⁴⁸

Form No. 31

The finding in the Commission's Report to the effect that the express rates were reasonable prior to November 7, 1933 up to the 120 per cent. basis (*or quote excerpt from finding*) is not supported by substantial evidence, is arbitrary, transcends the Commission's constitutional and statutory powers, and is void and of no effect. The Commission's said order, being necessarily based upon said invalid finding, is therefore arbitrary, transcends the Commission's constitutional and statutory powers, and is void and of no effect.

V. RELIEF SOUGHT

A. THAT A STATUTORY COURT BE CONVENED

Form No. 32

A. That upon the filing of this complaint the presiding judge of this court call to his assistance in the hearing and determination thereof two other judges, of whom at least one shall be a circuit judge, as prescribed in the Urgent Deficiencies Act⁴⁹ of October 22, 1913, 28 USCA 43-48 (*or*: Section 266⁵⁰ of the Judicial Code, 28 USCA 380).

B. THAT THE ADMINISTRATIVE RECORD BE CERTIFIED FOR FILING

Form No. 33

A. That the Board be required in conformity with section 10 (f) of the National Labor Relations Act, 29 USCA 160 (f), (*or other appropriate statutory provision*) to certify, within forty⁵¹ days, for filing in this court a transcript of the entire record in the aforementioned proceedings before the Board upon which said order was entered.

C. THAT ADDITIONAL EVIDENCE BE TAKEN

Form No. 34

A. That this Court enter an order requiring additional evidence to be taken before the Board relating to the matters alleged in paragraph — hereof, and that such additional evidence be made a part of the transcript of the administrative proceedings.

⁴⁷ Adapted from *George Allison & Co., Inc. v. Interstate Commerce Commission* (1939) 70 App. D. C. 375, 107 F. (2d) 180, cert. den. (1940) 309 U. S. 656, 84 L. Ed. 1005, 60 S. Ct. 470.

⁴⁸ See § 575 et seq.

⁴⁹ See § 633 et seq.

⁵⁰ See § 672 et seq.

⁵¹ See the following Circuit Courts of Appeal Rules: CCA 3, Rule 20(6); CCA 6, Rule 15(1); CCA 7, Rule 36(1); where enforcement by the National Labor Relations Board is sought, under CCA 7, Rule 35(2), the transcript should be filed within ten days.

APPENDIX B—FORMS

D. THAT ENFORCEMENT OF ORDER BE ENJOINED

Form No. 35

A. That said order No. 24065 dated November 28, 1933 be decreed to be confiscatory and unlawful and in violation of the Constitution of the United States, and that said order be decreed to be void.

B. That defendants, and each of them, and all other persons, be temporarily⁵² and permanently restrained and enjoined from any attempt to compel plaintiff, its officers, agents or employees, to observe or put in force on January 1, 1934, or to observe or keep in effect thereafter, any schedule of rates and charges for telephone service reducing the revenue of plaintiff, as required by said order of November 28, 1933, No. 24065.⁵³

E. THAT COMMENCEMENT OF JUDICIAL REVIEW OPERATE AS A STAY OF ADMINISTRATIVE ORDER

Form No. 36

A. That this court specifically order that the filing of this petition for review shall operate as a stay of the Commission's said order (*add, if elaboration is deemed desirable*) and that until final disposition of this case the enforcement of the Commission's said order shall be enjoined and restrained and its effect suspended.

F. THAT DEFENDANTS BE ENJOINED FROM ENFORCING PENALTIES⁵⁴

Form No. 37

A. That the defendants, and each of them, and each of their servants, agents and employees, and all other persons, be temporarily and permanently restrained and enjoined from taking or initiating any steps or proceedings against plaintiff, its officers, agents, or employees, or any of them, to enforce any penalties or any other remedy for disregarding the requirements of said order No. 24065, dated November 28, 1933.⁵⁵

G. THAT ORDER BE VACATED AND SET ASIDE⁵⁶

Form No. 38

A. That said order No. 24065, dated November 28, 1933, be decreed to be arbitrary and unlawful and in violation of the Fifth Amendment (*or other provision*) of the Constitution of the United States, (*or, in excess of the statutory powers of said Commission*), and that said order be vacated, annulled and set aside, and decreed to be void and of no effect.

⁵² See § 672 et seq.

⁵³ Adapted from West v. Chesapeake & Potomac Telephone Co. (1935) 295 U. S. 662, 79 L. Ed. 1640, 55 Ct. 894.

⁵⁴ See § 49.

⁵⁵ Adapted from West v. Chesapeake & Potomac Telephone Co. (1935) 295 U. S. 662, 79 L. Ed. 1640, 55 S. Ct. 894.

⁵⁶ For use where an injunction is not desired.

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H. THAT MANDATORY RELIEF BE GRANTED⁵⁷

Form No. 39

A. That a mandamus order be issued out of this court directed to the Interstate Commerce Commission commanding it to make an order or orders in Dockets 24145 and 24671 which shall direct payment by the defendant in said dockets to the plaintiffs herein as complainants of said dockets of all moneys paid by plaintiffs herein as express charges on shipment moving between December 1, 1929, and December 28, 1933, in excess of 105 per cent., up to and including 120 per cent., of the then applicable first class freight rates, with interest at the rate of 6 per cent. per annum from the dates said charges were paid.⁵⁸

I. FURTHER RELIEF

Form No. 40

A. That the plaintiff have such other, further and different relief as may be just and equitable in the premises.

Form No. 41

B. (*Upon petition for review under specific statutory provisions:*) That this Honorable Court exercise its jurisdiction over the parties and the subject matter of this petition and grant to petitioner such other and further relief in the premises as the rights and equities of the cause may require.

APPEAL FROM DECISION OF THE FEDERAL COMMUNICATIONS COMMISSION UNDER 47 USCA 402(b)

I. NOTICE OF APPEAL

Form No. 42

In United States Court of Appeals
for the District of Columbia

Sanders Brothers Radio Station,
a Corporation,

Appellant,

v.

Federal Communications Commission,
Appellee.

No. 7087

Notice of Appeal

Sanders Brothers Radio Station, an Illinois Corporation and licensee of Radio Broadcast Station WKBB, East Dubuque, Illinois, hereby gives notice of its appeal from a decision of the Federal Communications Commission, rendered July 2, 1937, granting an application of Telegraph Herald for a construction permit authorizing the construction and operation of a radio broadcasting station at Dubuque, Iowa, on 1340 kc., 500 watts, daytime only. On August 10, 1937, the appellant filed with the Commission a petition for re-

⁵⁷ See § 688 et seq.

⁵⁸ Adapted from *George Allison & Co., Inc. v. Interstate Commerce Commission* (1939) 70 App. D. C. 375, 107

F. (2d) 180, cert. den. (1940) 309 U. S. 656, 84 L. Ed. 1005, 60 S. Ct. 470.

APPENDIX B—FORMS

hearing of said decision of July 2, 1937, effective July 27, 1937, granting the application of Telegraph Herald, and on December 8, 1937, appellant's petition for rehearing was denied by the Commission.

In support of its appeal appellant assigns the reasons hereinafter set forth:

Statement of Reasons for Appeal⁵⁹

1. The Commission erred in finding that granting said application will serve public convenience, interest and necessity.

2. The Commission erred in failing to find that the operation of the station proposed by the Telegraph Herald will result in financial and economic injury to appellant, will impair the service rendered by appellant to its listening audience, and will jeopardize the ability of appellant to serve the public convenience, interest and necessity, as prescribed by law.⁶⁰

3. The Commission erred in finding that there was a local need for the station proposed by the Telegraph Herald.

4. The Commission erred in finding that the Telegraph Herald had the necessary financial standing to operate a radio station.

Wherefore, appellant prays that this court enter judgment reversing said decision of the Commission and granting such other, further and different relief as to the court may seem just and proper.⁶¹

SANDERS BROTHERS RADIO STATION

By _____
Attorney
(Address)

II. NOTICE OF INTENTION TO INTERVENE

Form No. 43

In United States Court of Appeals
for the District of Columbia

Sanders Brothers Radio Station,
a Corporation,

Appellant,

v.

Federal Communications Commission,
Appellee.

No. 7087
Notice of Intention
to Intervene

Comes now the Telegraph Herald, a corporation organized and existing under the laws of the State of Iowa, by its attorney, and pursuant to section 402(d) of the Communications Act of 1934, as amended, files this Notice of

⁵⁹ These may be stated as in the specifications of error previously set forth, and are the equivalent of "assignments of error," *Missouri Broadcasting Corp. v. Federal Communications Commission* (1938) 68 App. D. C. 154, 94 F. (2d) 623, cert. den. 303 U. S. 655, 82 L. Ed. 1115, 58 S. Ct. 759.

⁶⁰ See *Florida Broadcasting Co. v.*

Federal Communications Commission (1939) 71 App. D. C. 231, 109 F. (2d) 668.

⁶¹ Adapted from *Federal Communications Commission v. Sanders Bros. Radio Station* (1940) 309 U. S. 470, 84 L. Ed. 869, 60 S. Ct. 693, rehearing denied 309 U. S. 642, 698, 84 L. Ed. 1037, 60 S. Ct. 693.

FEDERAL ADMINISTRATIVE LAW

Intention to Intervene in the above-entitled proceeding, and in support hereof, respectfully submits the following:

Statement of Interest

1. The said cause is an appeal under section 402(b) of the Communications Act of 1934, as amended, from a decision of the Federal Communications Commission rendered July 2, 1937 (Commission Docket No. 3967), granting an application of this intervener, Telegraph Herald, for a permit to construct a radio broadcasting station to operate daytime only in Dubuque, Iowa, on 1340 Kilocycles with 500 watts power. The call letters KDTH were assigned to the proposed station.

2. The appellant appeared as a respondent in the proceeding upon the application of this intervener before the Commission, from whose decision the appeal was taken in the above-entitled cause.

3. This intervener is interested in the appeal in said cause to the extent that a reversal or modification of the decision of which appellant complains would aggrieve it and adversely affect its interests for the reason that it would thereby be deprived of the permit which it now possesses to construct station KDTH by virtue of the action of the Commission in granting its application.⁶²

TELEGRAPH HERALD, INTERVENER,

By _____
Attorney
(Address)

(Add verification of nature of interest.)

⁶² Adapted from Federal Communications Commission v. Sanders Bros. Radio Station (1940) 309 U. S. 470, 84 L. Ed. 869, 60 S. Ct. 693, rehearing denied 309 U. S. 642, 698, 84 L. Ed. 1037, 60 S. Ct. 698.

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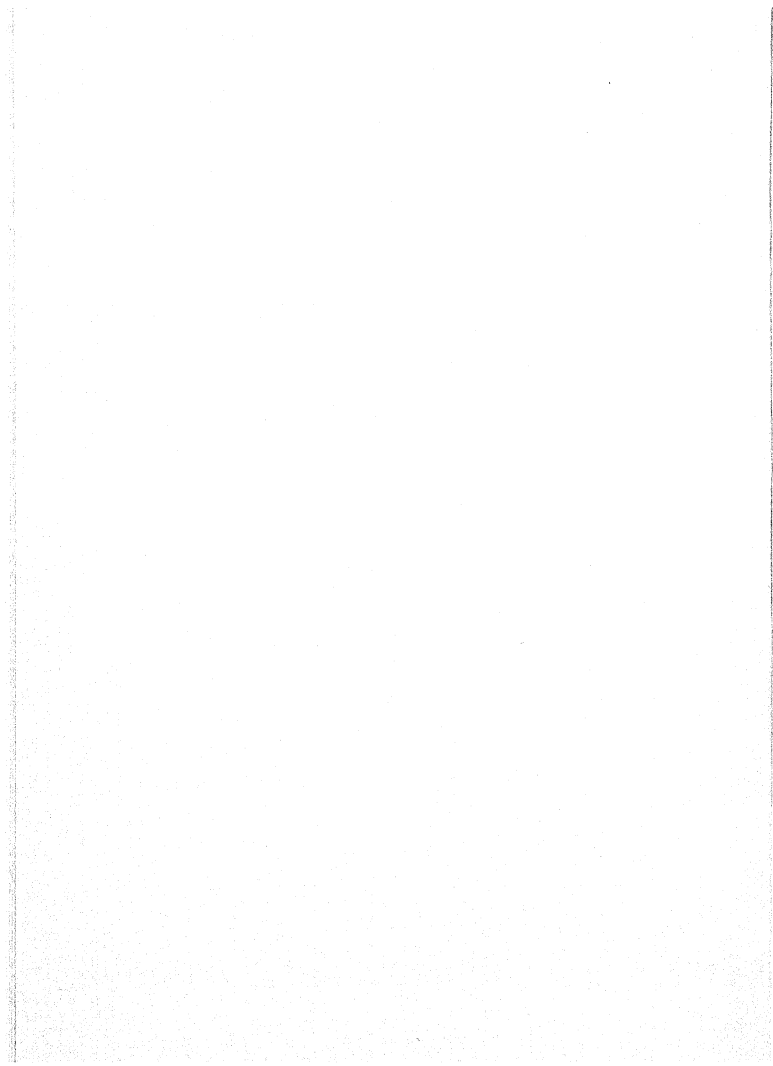


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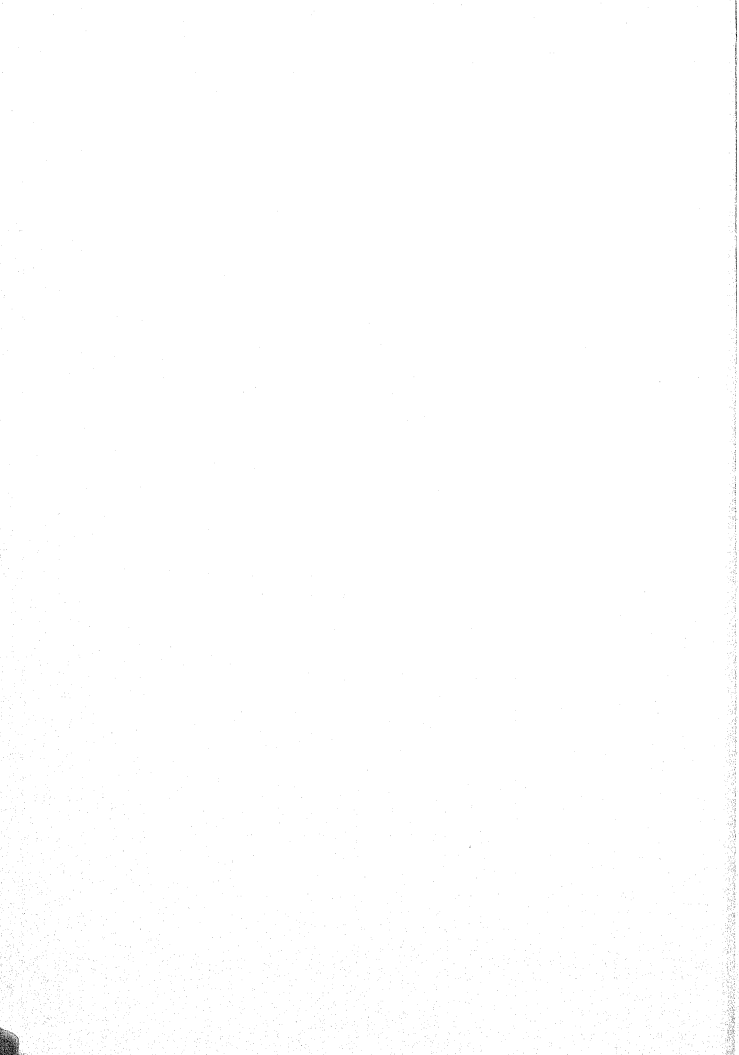
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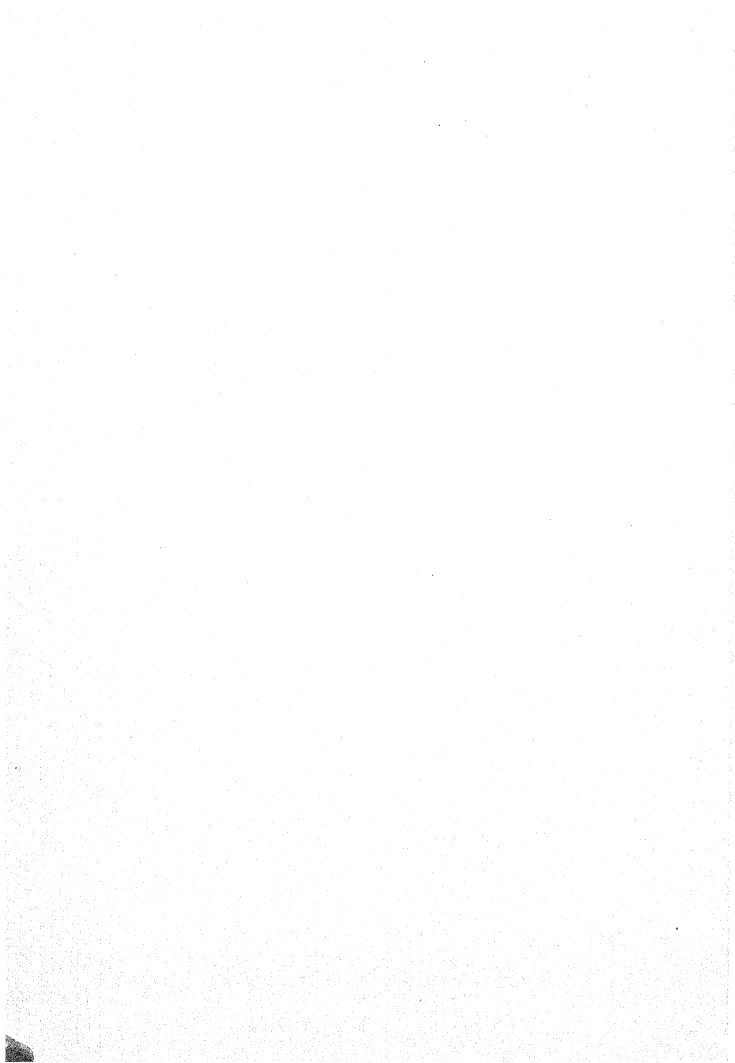
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